

*KIHCI-ASOTAMÂTOWIN* (THE TREATY SOVEREIGNS' SACRED AGREEMENTS) AND  
THE CROWN'S CONSTITUTIONAL OBLIGATIONS TO HOLDERS OF TREATY RIGHTS  
THROUGH CONSULTATION AND RESTORATION OF TREATY CONSTITUTIONALISM.



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<sup>1</sup> Treaty 3 Medallion signed on October 3, 1873 between the Saulteaux, Ojibway Nations and the Crown depicting *Kihci-Asotamâtowin*, The Treaty Sovereigns' Sacred Undertakings to each other with the enduring symbolism of the sun shining, the grass growing and the river flowing.

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## **ABSTRACT**

The purpose of this thesis is to assess the Crown's Constitutional duty of consultation and its application on the holders of Treaty rights. Indigenous legal and Constitutional orders are the underpinning of the consensual Treaties. They were negotiated by sovereign nations through mutual consent and established a distinct Constitutional authority establishing rights, responsibilities and rules of coexistence. Their implementation is a Crown Constitutional obligation. This thesis argues that the duty to consult jurisprudence reveals systemic colonial problems in the common law Treaty rights paradigm by colonial interpretation, unilateral abridgement and justified infringement of the consensual Treaty. Further, judicial and politically created doctrines of the honour of the Crown and reconciliation are rendered meaningless when used as part of the ongoing colonial paradigm and abridgement of Treaties. This thesis argues that Canada must enter a post-colonial era by giving content to Indigenous legal and Constitutional orders by implementing Treaty through Treaty Constitutionalism. This requires Canada to undertake a Constitutional paradigm shift to accord the sacred and inviolable Treaties their proper place as foundational instruments in the building of Canada. This means, as well, that the only forum for proper consultation on the numbered Treaties is through Constitutional conferences with full and equal participation of Treaty First Nations.

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## INTRODUCTION

Indigenous legal and constitutional orders provide the authority for the Treaty First Nations to enter into Treaty and create *Kihci-Asotamâtowin*, the sacred agreements made to one another. The Treaty order, entered into between two foreign, yet sovereign nations, created a distinct federalism where each maintained their respective sovereignty, nationhood and way of living. Indigenous Legal and Constitutional orders are the underpinning of the consensual Treaties. They were negotiated by sovereign nations through mutual consent and established a distinct Constitutional authority establishing rights, responsibilities and rules of coexistence. The implementation of treaty is a Crown Constitutional obligation.

However, instead of fulfilling the spirit and intent of the Treaty, unilateral Canadian laws were created and enforced to prevent Treaty First Nation people from asserting rights over their territories and to make their governance systems and laws illegitimate. Today, Indigenous people find themselves in a fierce struggle to protect their rights and lands which is nothing short of a struggle to survive as nations. First Nation Governments regularly face a lack of process and inclusion before land and resources deals are struck that effect traditional territories and economies. The policy of denying Indigenous legal orders, rights and interests largely persists as the Crown continues to issue interests in Indigenous lands and resources. Canada and commercial sectors have become wealthy from the resources harvested while Treaty First Nations live in utter poverty through the dispossession of their land and the lack of full recognition and implementation of Indigenous and Treaty Rights.

In 1985 the Supreme Court of Canada began to flesh out a requirement on Government to consult with Aboriginal people of Canada when impacting their constitutional rights.<sup>2</sup> Then in 2005, the Supreme Court released three decisions delineating a clear legal duty of consultation and accommodation on Governments in

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<sup>2</sup> *Guerin v The Queen*, [1984] 2 SCR 335 [*Guerin*]. The SCC found that the INAC failed to consult with the Musqueam before accepting a lease with unfavourable terms with a third party.

*Haida*<sup>3</sup>, *Taku River Tlingit*<sup>4</sup> and *Mikisew*<sup>5</sup>. These court decisions resonated across the country propelling both government and industry out of their apathy as First Nation litigation threatened large resource development projects. Government and industry hastened to educate themselves about the existence of Aboriginal title, Treaty and Aboriginal rights and how the legal duty to consult implicates them. The duty to consult has demanded a formal recognition of Indigenous interests and the impact governmental decisions have on those rights.

This thesis examines the sacred and inviolable treaties and the application of the legal duty to consult to holders of Treaty rights. Judicial and politically created doctrines such as the honour of the Crown and reconciliation, as part of the duty to consult are rendered meaningless when used as part of the ongoing colonial paradigm and abridgement of Treaties. This thesis argues that Canada must enter a post colonial era by giving content to Indigenous legal and Constitutional orders by implementing Treaty through Treaty Constitutionalism and Bi-lateral Federalism. This requires Canada to undertake a Constitutional paradigm shift to accord the sacred and inviolable Treaties their proper place as foundational instruments in the building of Canada. This means, as well, that the only forum for proper consultation on the numbered Treaties is through Constitutional conferences with full and equal participation of Treaty First Nations. This thesis contains five chapters.

**Chapter One** sets our foundation and establishes the inherent foundation of Indigenous legal and Constitutional orders. Indigenous legal and Constitutional orders are the underpinning of Indigenous nationhood and sovereignty and provided the authority for negotiations of Treaty with the Crown. Treaty is considered by Indigenous Treaty beneficiaries as both sacred and inviolable. The Treaty negotiations created a exclusive relationship between two foreign, yet sovereign nations exchanging solemn promises.

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<sup>3</sup> *Haida Nation v British Columbia (Minister of Forests)*, [2004] SCC 73, [2004] 3 SCR 511 [*Haida*].

<sup>4</sup> *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 [*Taku*].

<sup>5</sup> *Mikisew Cree First Nation v British Columbia*, 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew*].



The understandings between the parties concerned fundamental aspects of the relationship, such as, war and peace, annuities, the promise of a continuation of way of life, and other multiple aspects of coexistence. The imperial Crown entered into Treaty as instruments of royal prerogative which bind the Crown and create enforceable obligations based on the mutual consent of the sovereign parties. The consensual Treaty represents the original Constitution order in Canada.

**Chapter Two** explains Indigenous treaty nations are independent nations, freely associated states and distinct from European settlers or colonists. Indigenous nations did not surrender either their autonomy nor their legal and Constitutional orders when they entered the Treaty agreements. In fact, the premise of the Treaties was the guarantee of the continued sovereignties right of self-governance, which was never surrendered. The authority of Indigenous nations derives directly from the consent of their citizens. Entering into Treaty placed Treaty First Nations under the protections of the Crown. As protected nations, Treaty First Nation citizens were never subject to the authority of the imperial Parliament and remained as foreign jurisdictions under the imperial Crown. The sacred and inviolable treaties have generated both international and Constitutional obligations for their implementation on the Crown. This chapter frames the Crown's Constitutional obligation for implementation including the current common law paradigm on Treaty rights which presents a paradox of the Crown being both a protector and an opponent of Treaty nations.

**Chapter Three** examines the judicial doctrine of the honour of the Crown. First, the origins of the doctrine are examined to understand its colonial foundation. Then its judicial evolution from a fiduciary obligation owed by the Crown to its current manifestation where the honour of the Crown is a surrogate where Indigenous claims are, at common law, purported to be insufficiently specific to mandate a fiduciary standard. The separation of these doctrines has resulted in an arguably lesser standard of protection as the honour of the Crown has been thought of as imposing a moral and virtuous obligation on a Government who has anything but toward Treaty First Nation people. Inherent difficulties arguably arise in calling upon the Crown's honour through its

internal tension of self-preservation in the face of competing Indigenous rights claims. In order for the Honour of the Crown to have true legitimacy, it requires full and immediate Treaty implementation.

**Chapter Four** examines the historical neglect of the Crown's Constitutional duty to consult and accommodate holders of Treaty rights. It is here that the full extent of the historical neglect by the Crown of Treaty rights is abundantly clear. It's a history that demonstrates that Canadian governments are accustomed to making unfettered decisions about legislation, and the exercise of rights without consideration of the inherent and Constitutional rights of treaty people. Unilateral and colonial legislation such as the *Indian Act* and the *Natural Resources Transfer Agreement* in the *Constitution Act, 1930* are examples in the plethora of instruments used in the abridgement of the treaty and dispossession of Treaty First Nation people from their lands and resources. An examination of the jurisprudence on the duty to consult reveals a colonial course aimed at the dispossession of Treaty First Nation land and resources. It is also here, however, that the courts have curtailed that power by fleshing out the legal, Constitutional and enforceable duty upon the Crown through *Mikisew*.

**Chapter Five** argues that the accurate interpretation of Canada's Constitution begins with a recognition of Indigenous Constitutional orders by placing them within the shared rule in Canadian federalism. The idea of a shared rule or tri-partite federation has been described as Treaty federalism or treaty Constitutionalism. Treaty federalism restores the original position of Indigenous people possessing their own legal and Constitutional orders existing side by side with the Canadian Constitution. Treaties constitute the original Constitutional order and are the foundation laws of Canada and created shared responsibilities while preserving Indigenous legal and Constitutional orders. Canada possesses the framework for a shared Constitution through the *Constitution Act, 1982*. The framework can re-create the tri-partite federation envisioned by Treaty through the inclusion of Treaty Constitutionalism. The Crown will then, be able to engage in proper and just consultation on Treaty rights through Constitutional conferences. Also examined in this chapter is the court's corresponding precept of reconciliation and treaty

reconciliation. Much like the honour of the Crown, the theory of reconciliation has been used by the courts and governments to describe the relationship between Indigenous people and the Crown. The Supreme Court has indicated that reconciliation is the underlying purpose behind s. 35 of the *Constitution Act 1982*. However the court has used the concept of reconciliation as a guise to further the colonial agenda by undermining Indigenous sovereignty and broadening of legislative infringements of Treaty rights. Both the court and Crown's concept of reconciliation does not go far enough to effectively bring a true reconciliation to address the ills of centuries of colonialism and denial of Treaty rights and Treaty First Nation legal orders. True reconciliation will only occur through a complete paradigm shift through the inclusion of Indigenous legal and Constitutional orders.

There is truth that “the answer to a question can often depend on who is doing the asking,”<sup>6</sup> and as member of the Cree tribe of George Gordon First Nation, signatory to Treaty 4, the lens in which I view the jurisprudence around Treaty rights derives from realities of my people and the promise made in Treaty. This fact is particularly evident in teaching my daughter Darian about the history of Treaty people and our difficulty in reconciling that promised future with the stark reality of the state of our communities. The damage of colonization, residential schools, the *Indian Act*, poverty, the continued dispossession of the land and resources by the failure to honour Treaty cannot be understated. The court’s decisions on the Crown’s Constitutional obligations to holders of Treaty rights gives me a pause for hope, but only a pause. Canada and its institutions must be willing to recast the entire relationship through decolonization and reconciliation premised on the full and absolute recognition of Indigenous legal and Constitutional orders with immediate implementation of Treaty and the restoration of Treaty First Nations as part of a Tri-partite Federation.

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<sup>6</sup> Zina O’Leary, *The Essential Guide to Doing Research* (Los Angeles: Sage Publications, 2004) at 45.

## CHAPTER 1

### **INDIGENOUS LEGAL ORDERS AND *KIHCI-ASOTAMÂTOWIN* –THE TREATY SOVEREIGNS’ SACRED AGREEMENT**

“*Okimâw Miyo-wîcihitowiyêcikêwin, Wîtaskê-osihcikêwin* – An Agreement between the  
Sovereign Leaders to establish good relations and to live together in Peace”<sup>7</sup>

~Elder Norman Sunchild

#### **1.0 INTRODUCTION**

Pre-colonial, Indigenous people stood equal to any nation in sovereignty and nationhood, possessing sophisticated laws, and legal and social systems. These legal orders are part of a larger Indigenous Constitutional order which defines Indigenous governments, jurisdictions, and rights of citizens.<sup>8</sup> Indigenous Constitutional and legal orders are the underpinning to the authority, as sovereign nations, to negotiate the sacred and inviolable treaties. In negotiating Treaty, an exclusive relationship between two sovereign nations exchanging solemn promises was created and is expressed in the Cree language as *Kihci-asotamâtowin*, meaning the treaty sovereigns’ sacred undertakings. The understandings between the parties concerned fundamental aspects of the relationship, war and peace, trade, land use, the promise of a continuation of way of life,

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<sup>7</sup> Cardinal, Harold and Walter Hildebrandt, *Treaty Elders of Saskatchewan* (Calgary: University of Calgary Press, 2000) [Cardinal, *Treaty Elders*] at 33.

<sup>8</sup> Kiera L. Ladner, "Indigenous Governance: Questioning the Status and the Possibilities for Reconciliation with Canada's Commitment to Aboriginal and Treaty Rights," The National Centre for First Nation Governance, Research paper, (Sept., 2006 at 4, states, "Interesting – because most non-Indigenous people do not think of Indigenous peoples as having had constitutions prior to colonization. In fact, most would be likely to suggest that the only constitution Indigenous peoples have (or ever had) is the Canadian Constitution. But Indigenous peoples were not sitting around waiting for colonists to provide them with government. Nor were they waiting for settlers to provide or assist in creating constitutions which define and confine a system of government, the rights and/or responsibilities of government officials, matters of jurisdiction, or the rights and/or responsibilities of citizens. Still, we tend not to think in terms of Indigenous constitutions or of Indigenous peoples having had constitutional orders historically. Yet, these constitutional orders provided the teachings, ‘supreme law’, political philosophies and jurisdictions that were operationalized within the political system." See for a sample constitution, The Federation of Saskatchewan Indian Nations, "The First Nation Indian Government and The Canadian Confederation," at 83 [Ladner, "Indigenous Governance"].  
[http://fngovernance.org/ncfng\\_research/kiera\\_ladner.pdf](http://fngovernance.org/ncfng_research/kiera_ladner.pdf)

with other multiple facets of a shared, yet separate coexistence. The Treaty relationship is based upon sacred Indigenous laws that translated into Treaty law and doctrines.

The Treaty order and corresponding rights and responsibilities possess a distinct Constitutional authority that established rules of coexistence between Indigenous nations and the Crown. The Treaty jurisprudence, in itself, created a consensual nation-to-nation Constitutional commitment of consultation in the highest order, exclusively by the signatories. The Treaty Indigenous nations entered into Treaty based on inherent and sacred laws and are bound by those laws. The Imperial king ?Queen entered into Treaty as an exercise of Royal Privilege. As such, Treaties bind the king and queen and create enforceable obligations based wholly and only on the mutual consent of the sovereign parties.<sup>9</sup> This chapter examines Indigenous legal and Treaty orders in their original status possessing a distinct Constitutional order that converged with the British Constitutional order at the signing of the numbered treaties and creating a sacred jurisprudence. Canada's Constitutional order has legitimacy because of Treaty through and by the consent of the Indigenous people.

## **1.1 INDIGENOUS LEGAL AND CONSTITUTIONAL ORDERS**

Indigenous laws flow from sources that lie outside of common and civil law traditions. The imposition of colonialism and common law did not alter Indigenous legal orders and law. Indigenous legal orders are comprehensive, holistic orders that developed independent of British legal traditions and extended through the Treaties with other legal orders. Adjudicative traditions of legal positivism are not sufficient to realize the inheritance of Indigenous rights implicit in Indigenous legal orders. Indigenous peoples developed spiritual, political and social customs and conventions to guide their relationships and these became the foundation for many complex systems of law. Each

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<sup>9</sup> *R v Badger* [1996] 1 SCR 771 at 812 para.76 [*Badger*], *Ontario (AG) v Bear Island Foundation*, [1991] 2 SCR 570 [*Bear Island*]; *Ontario v Dominion of Canada and Quebec*; *In Re: Indian Claims* at 504-05, 511-12 [*Re Indian Claims*]; *R. v Marshall*, [1999] 3 SCR 456 at 497, para 50 [*Marshall*]; *Campbell v British Columbia (AG)* at 355, para 84 [*Campbell*]; B. Slaterry, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 Can Bar Rev 209 [Slaterry, "Making Sense"].

Indigenous nation has its own unique ceremonies and formalities to renew, celebrate, transfer or abandon its legal relationships. Furthermore, each Indigenous nation has its own particular stories which categorize its legal relationships to the different orders of creation, and each group's stories differ according to its own history, material needs, spiritual alignment or social structure.<sup>10</sup> Indigenous teachings, traditions, and customs, oral history, practices, and perspectives establish *sui generis*.<sup>11</sup> Indigenous law and orders that can be known, studied and applied.<sup>12</sup> Indigenous knowledge is concerned with the study of Indigenous teachings; its principles are best translated as Indigenous jurisprudences.<sup>13</sup> Indigenous jurisprudence is based on ecological understanding and Indigenous language, unlike Eurocentric law, which is created by the artificial man state and is derived from theology and morals.<sup>14</sup> The Cree say that jurisprudence sets relationships into order.<sup>15</sup>

Indigenous rights find their source, not in Canadian law but in Indigenous jurisprudences. Indigenous customs and relationships give meaning to the content of Indigenous rights. The Indigenous inherent rights theory derives explicitly from Indigenous legal orders and jurisprudences. Indigenous sovereignty, inherent Indigenous rights and Indigenous legal orders remain outside the purview of Canadian law.

Indigenous languages are key to understanding Indigenous legal orders and jurisprudences. The histories of Indigenous people are told through oral histories and teachings that are expressed in terms of animate and inanimate parts as opposed to gendered relations. When things such as rocks, rivers, etc, are identified as living, this

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<sup>10</sup> John Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41 McGill LJ 629 [Borrows, "With or Without You"].

<sup>11</sup> *Sui generis* is derived from the Latin language; *su* (of its own) and *generis*, genitive of *genus* (kind) meaning self generating being the only example of its kind.

<sup>12</sup> James (Sa'ke'j) Youngblood Henderson, *Aboriginal Jurisprudence and Rights*, in Kerry Wilkins, ed., *Advancing Aboriginal Claims, Visions/Strategies/Directions*, (Saskatoon: Purich Publishing Ltd., 2004 [Henderson, *Aboriginal Jurisprudence*]. See, for a more comprehensive view, Marie Battiste and James (Sa'ke'j) Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage* (Saskatoon: Purich Publishing Ltd., 2000) [Battiste, *Protecting Indigenous Knowledge*].

<sup>13</sup> *Ibid* at 71-73.

<sup>14</sup> *Ibid*.

<sup>15</sup> *Ibid*.

imports different legal obligations. Relationships and obligations that the environment, the animals and the people have in living together are reflected in the language. Indigenous languages contain the values of the society and Indigenous worldviews are inherent in its structure. The Indigenous perspective of rights and title flow from relationship with and responsibilities for the territories. Rather than Aboriginal title, the view is better understood as 'original title'. It encompasses a sacred relationship with the land, self-determination, responsibility and jurisdiction to protect, access and use the lands, waters and resources for the benefit of Indigenous people.<sup>16</sup>

Indigenous Constitutional orders underpin Indigenous political systems, systems as sophisticated as the society they were a part of. The Indigenous Constitutional orders were shaped by the realities of an Indigenous territory and provided opportunities to make, interpret, and enforce laws in a manner that was consensual and inclusive.<sup>17</sup> In constructing their political systems, each nation created unique and complex systems of government. Indigenous political systems were created and are maintained by a Constitutional order.<sup>18</sup> The Indigenous Constitutional order is a system of government which provides the ability to make, interpret and enforce laws within a territory and set forth the rules of and the roles and responsibilities of all members of the nation.<sup>19</sup> Unlike the written Canadian Constitution, Indigenous Constitutional orders were oral documents consisting of songs, stories, ceremony, orations and bundles.<sup>20</sup> These Constitutional orders provide for Indigenous political systems and their ability to make, interpret and enforce law within a given territory. Indigenous Constitutional orders are not subject to the authority of another nation or another government, but they were subject to the people

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<sup>16</sup> *Ibid* at 73.

<sup>17</sup> Ladner, "Indigenous Governance", *supra* note 2 at 3.

<sup>18</sup> *Ibid* Ladner provides examples of Indigenous constitutions, which include the *Haudenosaunee* Great Law of Peace, the Mi'kmaq teachings of the seven districts that comprise the Grand Council and the rights and responsibilities of individuals, families, clans and leadership within each district and the Adaak and Kungax of the Gitxan and Wet'suwet'en nations which lay out the laws (rights and responsibilities) of each of the houses and the each of the nations. See also, John Borrows, *Canada's Indigenous Constitution*, (Toronto: University of Toronto Press, 2010).

<sup>19</sup> *Ibid*.

<sup>20</sup> *Ibid*.

of the nation and the manner in which they decided to live within and relate to their territory (and other beings in their territory).<sup>21</sup>

Understanding that Indigenous legal and Constitutional orders and Canadian jurisprudence derive from different and distinct knowledge systems and worldviews is necessary for a just understanding of Treaty. Indigenous legal orders are independent legal interests, inherent orders of legislation, not delegated nor a result of colonial recognition or royal proclamations. Indigenous legal and Constitutional orders were uninterrupted and unaltered by the reception of common law for the colonialist settlers. There is a continuity of Indigenous nations' legal relationships in the land they traditionally occupied prior to European colonization that both predated and survived European claims to sovereignty.<sup>22</sup> Indigenous legal orders are, in every sense, part of the ancient Constitutional law of the land.<sup>23</sup>

## **1.2 INDIGENOUS NATIONHOOD**

Pre-colonial, Indigenous nations were independent nations with autonomous and sovereign legal orders. As nations, Indigenous people engaged in diplomacy and foreign affairs as evidenced through the treaty making process. Treaty and inter-governmental relations and diplomacy were used in negotiation of peaceful relations, economic reciprocity and coexistence within the same territory. Prior to the arrival of Europeans, the Treaty process was a powerful means of nation-to-nation relationships. The advent of Europeans arrival necessitated agreements for trading and military alliances. The early period held a semblance of mutual respect of the social, cultural and political differences. Both the Indigenous nations and European settlers were considered as distinct and autonomous each possessing an internal Constitutional order.

Early British policy and practice was based on the recognition of Indigenous nationhood and the existence of nation-to-nation relationships. Early colonial judicial

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<sup>21</sup> *Ibid.*

<sup>22</sup> *Guerin, supra* note 2 at 336.

<sup>23</sup> Henderson, *Aboriginal Jurisprudence, supra* note 12 at 7.



cases in the common law tradition recognized the nation-to-nation legal relationship. In 1705, in *Mohegan Indians v Connecticut*<sup>24</sup> a Royal Commission found the Mohegan First Nation to be a "sovereign nation, which was not subservient to the colony."<sup>25</sup> In that case, the Connecticut legislative assembly claimed jurisdiction through a royal charter over the Mohegan's and their lands in spite of a pre-existing treaty. The Royal Commission in its jurisdiction decision in 1743 upheld the terms of the Treaty and the separation of the Indian Nations from the colonies where it held:

The Indians, though living amongst the king's subjects in these countries, are a separate and distinct people from them, they are treated with as such, they have a polity of their own, they make peace and war with any nation of Indians when they think fit, without control from the English. It is apparent the crown looks upon them not as subjects, but as a distinct people, for they are mentioned as such throughout Queen Anne's and his present Majesty's commission by which we now sit. And it is as plain, in my conception, that the crown looks upon the Indians as having the property of the soil of these countries; and that their lands are not, by His Majesty's grant of particular limits of them for a colony, thereby impropriated in his subjects till they have made fair and honest purchases of the natives.<sup>26</sup> [emphasis added]

Then in 1867, the Superior Court of Quebec in *Connolly v. Woolrich* (1867), recognized Aboriginal peoples as “autonomous nations living under the protection of the Crown, retaining their territorial rights, political organizations and common laws.”<sup>27</sup> Thus, in establishing nation-to-nation relationships and in recognizing Indigenous nations, the European kings respected Indigenous nation’s legal orders. Most importantly, the settlers were prohibited by the *Royal Proclamation 1763* and Imperial law to interfere with Indigenous nationhood and sovereignty.

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<sup>24</sup> James (Sa’ke’j) Youngblood Henderson, “Empowering Treaty Federalism” (1994) 58 Sask L Rev 241 at 252 [Henderson, “Treaty Federalism”] citing *Mohegan Indian v Connecticut* in J.H. Smith, *Appeals to the Privy Council From the American Plantation* (New York: Octagon Books, 1965) at 425.

<sup>25</sup> *Ibid.*

<sup>26</sup> Henderson, “Treaty Federalism”, *supra* note 24 at 252. Henderson notes that ironically the First Nations of North America have not been elevated to statehood nor formally annexed to Canada but yet are still administered as colonies by the Provinces of Canada.

<sup>27</sup> *Connolly v Woolrich and Johnson et al* (1867), 17 RJRQ 75 also reported 11 L C Jur 197 Quebec Superior Court, Monk J., 9 July 1867.

Indigenous Nations possessed their own legal and Constitutional authority and entered into the treaty relationship with the British Crown on that basis. They possessed authority over their people and the territory. Treaties were a confirmation of the autonomous authority Indigenous people held. Treaties and the rights and obligations therein were to be protected under the Treaty by the British Crown. Henderson in “Treaty Federalism,” explains:

Thus, treaty federalism transformed inherent rights of an Aboriginal order into vested rights in the constitutional law of Great Britain, then the United Kingdom and then Canada. Although the treaties could not affect First Nations' international status, autonomy, identity or customary law, often the terms of the treaties consensually altered their relationship to other nations. The treaties united the First Nations as freely associated states of the United Kingdom, not as part of any colony, province or dominion. Consequently, treaty federalism united independent First Nations under one Crown, but not under one law.<sup>28</sup>[emphasis added]

As well, in 1990, Justice Lamer in *R. v. Sioui*, held that the 1760 Treaty of the Crown with the Hurons confirmed the independence of Treaty First Nations by stating:

... from the historical documents that both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations. The mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality. This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations.<sup>29</sup>

### **1.3 THE ROYAL PROCLAMATION 1763**

Following the conclusion of the seven year war the first Constitutional prerogative act was issued by King George III, the *Royal Proclamation* of 1763.<sup>30</sup> The

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<sup>28</sup> Henderson, “Treaty Federalism”, *supra* note 24 at 252.

<sup>29</sup> *R v Sioui*, [1990] 1 SCR 1025 at 1052-53 [*Sioui*].

<sup>30</sup> *Royal Proclamation 1763 (U.K.)*, re-printed RSC 1985, App II, No 1 [*Royal Proclamation*]. See also: The Crown's Fiduciary Relationship with Aboriginal peoples at online: Library of Parliament <<http://www.parl.gc.ca/information/library/PRBpubs/prb0009-e.pdf>>

British were experiencing growing conflict with the Indigenous nations and tribes as increased settlement threatened Indigenous territories. They also desired to maintain the Indians as allies as they still possessed military and economic power. Initially, the British did not follow the standard set by the French in reciprocity toward the Indians including the adherence to Aboriginal protocols and gift giving for diplomacy between the nations.<sup>31</sup> The absence of the diplomacy had precipitated Chief Pontiac's war in 1763 and the requirement of King George III to issue the *Royal Proclamation*.<sup>32</sup> It states,

And whereas it is just and reasonable, and essential to our interest, and the security of our colonies, the several nations or tribes of Indians with whom we are connected, and who live under our protection, should not be molested or disturbed in the possession of such parts of our Dominions and territories as, not having been ceded to or purchased by us, are reserved to them, or any of them as their hunting grounds.<sup>33</sup>

As Imperial policy, the *Royal Proclamation* of 1763 confirmed the exclusivity of the relationship between the Crown and the Indigenous Nations and reflected the Crown's policy toward Indians and their lands. The *Proclamation* prohibited private purchase of Aboriginal title and provided only the King could purchase Indigenous Nations' lands. The *Royal Proclamation* also influenced the Treaty of Niagara in 1764,<sup>34</sup> accounts of which are described as a very large assembly where the Proclamation was read out to the Indians in attendance. The *Proclamation* set out Imperial control over Indian lands and

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<sup>31</sup> The French relied greatly on the Indians as allies in war and economic venture. See Gillis Harvard, *The Great Peace of Montreal of 1701: French-Native Diplomacy in the Seventeenth Century* (Montreal: McGill Queen's University Press, 2001).

<sup>32</sup> Richard White, "The Middle ground: Indian, empires and republics in the Great Lakes Region, 1650", Chapter 6 & 7, *The Clash of the Empires and Pontiac and the Restoration of the Middle Ground* (Cambridge University Press, 1991).

<sup>33</sup> *Royal Proclamation*, *supra* note 30.

<sup>34</sup> John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Editor Michael Asch *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity and Respect for Difference* (Vancouver: UBC Press, 1997), 155-72. [Burrows, Wampum at Niagara] The Covenant chain promised peace and justice and prosperity to the Indians, The Twenty Four Nations belt illustrated the prosperity to have followed the alliance. The proclamation did not have the desired effect and in early 1764, Sir William Johnson convened the Congress on the Niagara with the Confederacy Chiefs in the region. Two wampum belts, the "Covenant Chain" and the "Twenty Four Nations" belt represented the new alliance with the British known as the Treaty of Niagara.

prohibited private purchase by any third party.<sup>35</sup> For the British, the *Royal Proclamation* set out the legal framework for making treaties with Indigenous nations and established strict procedures for British territorial expansion in North America.

Under the pretext of imperial protection, the *Royal Proclamation* has been described as the Indian Bill of Rights<sup>36</sup> and having the force of the Magna Carta throughout the Empire by recognizing Indigenous people as nations. But by stipulating that only the British king could acquire their lands, the king prevented purchases by private individuals or companies of Indigenous lands. From early in its colonizing period, the British Crown pursued a policy set out in the *Royal Proclamation*, which purported to establish Britain's vast new North American empire and delineated relations with the Indigenous peoples of Canada. In effect, the Crown recognized Indigenous land ownership and authority as continuing under the asserted British sovereignty.<sup>37</sup> A significant provision of the *Royal Proclamation* was that only the king could acquire land from Indigenous Nations, and only by nation-to-nation treaty. The Proclamation is an imperial Constitutional document recognizing Indigenous title and has full force as an imperial act, being referred to in the Sec. 25 of the *Constitution Act, 1982*.<sup>38</sup> The *Royal*

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<sup>35</sup> *Chippewas of Sarnia Band v Canada*, (2000) 51 OR (3d) 641 (ONCA) at 53-56.

<sup>36</sup> *St. Catherine's Milling & Lumber Co. v The Queen* [1887], 13 SCR 313 at 652 [*St. Catherine*] Gwynne J., in dissent described the *Royal Proclamation* as the "Indian Bill of Rights". In *Calder v The Attorney General of British Columbia*, [1973] SCR 313 at 395, Hall J., in dissent, drew an analogy to the Magna Carta.

<sup>37</sup> The *Royal Proclamation* directed at the colonial authority. Critically assessed, it was used simultaneously as a protective instrument with the objective of land acquisition and the denial of Indigenous legal and constitutional orders by undercutting Indigenous sovereignty. It contained highly contradictory terms which violated the spirit and intent of the Treaties and the normative relationship. Although it acknowledged pre-existing rights, at the same time, it usurped the most fundamental of those rights, Indigenous sovereignty. The British wanted to dispel the Indians' discontent over increased settlement by leading them to believe their interests would be protected. However, the inclusion of the words "dominion", and "sovereignty" over the Indigenous Nation territories was the antithesis of the Indigenous Nations' autonomous position. The *Proclamation* recognized the Indian's right to their lands by forbidding survey and settlement and at the same time developed a mechanism for their removal through purchase only by the Crown. The discrepancies were never resolved as the British privileged its understanding of how Indigenous people could use their land and their ability to freely determine their own land use. In addition to the protective features, the *Royal Proclamation* represents a shift in the power away from the Indigenous nations and began an enduring paradox and contradictory relationship by the Crown toward Indigenous nations.

<sup>38</sup> *The Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, Sec. 25 states, "The guarantee in this Charter of certain rights and freedoms shall not be construed so as

*Proclamation* also established Constitutional consultation in imperial law through the nation-to-nation treaty arrangements and implementation. The *Royal Proclamation* confirmed the existence of Indigenous title to land, although Indigenous title existed independent of it<sup>39</sup> and was not created by it. The *Royal Proclamation*, together with *Rupert's Land And North Western Territory Order*,<sup>40</sup> protected the Indigenous nations against intrusions by the British colonists and settlers. The Treaties created a consensual relationship where none had existed before.

#### 1.4 THE SACRED AND INVIOABLE TREATIES

Early contact of Indigenous nations with the European sovereigns, French or British, occurred in negotiations, consultations, and war.<sup>41</sup> The European sovereigns recognized they could not gain access to the land without treating with the Indigenous people through agreements and obtaining their full and informed consent. The origins of European consultations with Indigenous people can be traced back to the 1500's when European fur traders struck commercial-type agreements with Indigenous Nations for furs and provisions.<sup>42</sup> In the following century treaties were negotiated between the European sovereigns and the Iroquois Confederacy. In 1701, a Great Peace agreement occurred when 1,300 representatives of 40 Indigenous Nations gathered in Montreal to make a treaty with France that ended a century of war between the confederacy and New France.<sup>43</sup> Later there were peace and friendship treaties between Indigenous Nations and

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to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples in Canada including...(a) any rights or freedoms that have been recognized by the *Royal Proclamation* of October 7, 1763."

<sup>39</sup> *R v Delgamuukw*, [1997] 3 SCR 1010 at para 114 [*Delgamuukw*].

<sup>40</sup> *Rupert's Land And North-Western Territory Order*, (UK)(23 June 1870), reprinted in RSC 1985, App II No 9.

<sup>41</sup> Peace and Friendship Treaties were entered into from 1685 until 1779.

<sup>42</sup> The Royal Commission on Aboriginal Peoples. *Report on the Royal Commission of Aboriginal Peoples*. Vol. I, *Looking Forward, Looking Back*. (Ottawa: Canada Communication Group, 1996). [RCAP *Final Report* Vol 1].

<sup>43</sup> Arnot, David, "The Honour of First Nations - The Honour of the Crown, The Unique Relationship of First Nations with the Crown", Unpublished paper presented at *The Crown in Canada: Present Realities and Future Options* (June 9, 2003) <[http://www.queensu.ca/iigr/conf/Arch/2010/ConferenceOnTheCrown/CrownConferencePapers/The\\_Crown\\_and\\_the\\_First\\_Nations.pdf](http://www.queensu.ca/iigr/conf/Arch/2010/ConferenceOnTheCrown/CrownConferencePapers/The_Crown_and_the_First_Nations.pdf)>.

the British king that allowed limited British settlement on land purchased from the Indigenous nations.<sup>44</sup> Over the following century, after the creation of Canada by the *Constitution Act, 1867*,<sup>45</sup> negotiations were undertaken across Indigenous territory by the numbered treaties.<sup>46</sup>

Treaty rights are a post-contact derivative of the legal relationship entered into between the British king and the Indigenous nations. As negotiated rights, treaty rights are comprised of responsibilities and rights mutually agreed to between the parties. Treaty rights affirm Indigenous rights and legal orders,<sup>47</sup> which continue in full form and content. Treaty rights, as imperial law, reaffirmed facets of Indigenous rights and also include rights and responsibilities that did not previously exist such as the establishment of reserves set aside, annuity payments, blankets, horses, shelter (housing), schooling (education), medicine chest (medicare), agriculture and other implements.

#### **1.4.1 *Wiyôhtâwîmâw –Itêyimikoswiyêcikêwina – Treaty Arrangements ordained by the Creator***

Indigenous legal orders are based upon a theoretical foundation of creation and the relationship to the Creator as the center of Indigenous nation laws, such as Cree, Dene or other Indigenous nations. The spiritual connection to the Creator and to creation is a communal doctrine among Indigenous tribes and confederacies. This relationship enabled Indigenous people to meet their physical and spiritual needs in a complete and whole

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<sup>44</sup> *Ibid* at 3.

<sup>45</sup> *The Constitution Act, 1867* (UK.), 30 & 31 Vict c 3 (formerly *The British North America Act, 1867*) [*Constitution Act, 1867*].

<sup>46</sup> Arnot, "The Honour of the Crown" *supra* note 43 at 4-5, explains that 68 Pre and Post confederation Treaties were signed in Canada being Treaties 1 and 2, 1871, southern Manitoba and Saskatchewan, Ojibway and Cree, Treaty 3, 1873, Lake of the Woods region of Ontario, Saulteaux (Ojibway), Treaty 4, 1874, southern Saskatchewan (Qu'Appelle region), Cree and Saulteaux (Ojibway), Treaty 5, 1875, central and northern Manitoba, Saulteaux (Ojibway) and Swampy Cree, Treaty 6, 1876, central Saskatchewan and Alberta, mostly Plains and Woodlands Cree, Treaty 7, 1877, southern Alberta, Blackfoot and others, Treaty 8, 1899, northern Alberta and northeast corner of B.C., Cree, Dene, Dogrib and others, Treaty 9, 1905, northern Ontario (James Bay region), Ojibway, Cree and others, Treaty 10, 1906, northern Saskatchewan (Peace River region), primarily Dene and Métis, Treaty 11, 1921, western part of Northwest Territories, primarily Dene and Métis of the Mackenzie region.

<sup>47</sup> *R v Van der Peet*, [1996] 2 SCR 507 at 229 [*Van der Peet*].

union. Treaty First Nation Elders explain treaties from a theoretical perspective governed by the spiritual foundations and processes upon which the Indigenous Nations negotiated the treaties. It is a description of spiritual principles, traditions, protocols, and ceremonies used by the Indigenous Nations.<sup>48</sup> The law originates with the understanding that the Creator placed Indigenous people on Earth and specifically, North America, (described as *iyiniwi-ministik*, meaning the peoples' island). The sacredness of the Earth is foundational in Indigenous laws which included *iyiniw sawêyihâtâkosiwin*, which is the people's gifts such as the land, animals, ecology and the laws and principles that guide their conduct.<sup>49</sup>

In Indigenous legal orders there is a right to maintain, as peoples, the Indigenous Nations' relationship with the Creator through the laws given to them by the Creator. From a sacred law perspective, the relationship with the Creator is the starting point of the discussions on Treaties. Indigenous laws, values and principles were the framework upon which they created relationships with the arriving European nations. Cree Elders use the following phrase to describe the treaties establishing First Nations relationships with European nations, "*itêyimikoswiwêcikêwina*" which means arrangements ordained or inspired by the Creator.

In Treaty Law, both the Treaty nations and the British Crown solemnly promised the Creator that they would conduct their relationships with each other in accordance with the laws, values, and principles given to each of them by the Creator. The Treaty vows were formally made to the Creator (*wiyôhtâwîmâw*) through ceremonies conducted in accordance with the laws governing them. The promises, agreements, and vows made to one another and the Creator are considered irrevocable and inviolable in sacred Indigenous and Treaty law.<sup>50</sup>

This principle was affirmed by the Indigenous ceremonies during the treaty negotiations. Pipe ceremonies were at the heart of these agreements. The pipe, more than

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<sup>48</sup> Cardinal, *Treaty Elders*, *supra* note 7 at 7.

<sup>49</sup> *Ibid* at 10.

<sup>50</sup> *Ibid*.

symbolic, made the agreement sacred and binding between the parties and the Creator. From the perspective of Indigenous law, it is the most significant relationship that can be entered into. Similarly, the wampum belts, in the eastern nations, recorded the mutual, sacred and agreed upon principles of equality and independence of the Indigenous people.<sup>51</sup> The British nation also adhered to the spiritual nature and the Treaty Commissioners travelled with clergy men, who often vouched for the fidelity of the covenants being made to the Indians. Elders say that the treaties were meant to initiate an ongoing relationship between Indigenous Nations and the Queen for as long as the "sun shines, the waters flow and the grass grows," "as long as the sun and moon shall endure," "as the sun goes round, and the water flows," "as long as the sun rises over our head", and "as long as the water runs."<sup>52</sup> Those statements reflected a consistent understanding of the perpetuity of Treaty. European subjects were thus able to settle peacefully through most parts of the country by entering this sacred and consensual legal relationship and through the taking up clauses in the treaties.. At a fundamental level, the relationship between the parties included values and principles of *Manâtsiwin* (respect), *Yôspâtsiwin* (gentleness), *Kisêwâtsiwin* (kindness), *Kwayaskâtsiwin* (honesty and fairness) and *Kanâtsiwin* (cleanliness).

At the time of the signing of each Treaty, a sacred convergence occurred between the Indigenous nations and British Crown. The original and sacred convergence affirmed the legal and Constitutional orders of Indigenous nations as the legitimate and rightful nations whom possessed original interests in their territories. At the same time, the convergence affirmed the same respective rights and powers of the British Crown. The

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<sup>51</sup> Borrows, "Wampum at Niagara", *supra* note 34 at 155. The Two Row Wampum was created by beads made from the Quahog shells which shells that are purple and white in colour. It is a white belt with two equal lines down the center. The white symbolizes the river of life and the two lines represent the Mohawk Nation and the European Nation (Dutch). Today the official colour of the Mohawk Nation is purple based on the importance of the wampum. The two-row wampum embodies the legal principles the Mohawk Nation and other First Nations would use as a template with their discussions and negotiations to make treaty. The wampum is a representation of the two nations which nations that travel side by side but do not interfere with each other. Their boats and canoe contain all of their laws, culture, governing institutions and religion. The wampum is a representation that both parties are independent but travel together in the same direction.

<sup>52</sup> James Sa'ke'j Henderson, *Treaty Rights in the Constitution of Canada* (Toronto: Thompson Carswell, 2007) at 22-23 [Henderson, *Treaty Rights*].



convergence meant a delegation of responsibilities, through Treaty, to the Crown. Those responsibilities that were not delegated remain within the exclusive jurisdiction of the Indigenous nation and their legal and Constitutional orders.

#### **1.4.2 *Miyo-wîcêhtowin – The Doctrine of Good Relations***

Implicit in the Treaty relationship was the principle of *miyo-wîcêhtowin*, the principle of having or possessing good relations as a core doctrine of the Cree Nation.<sup>53</sup> It requires the Indigenous (Cree) peoples to conduct themselves in a manner where good relations are created, both individually and as a collective. This doctrine originates in the laws and relationships that their nation has with the Creator. As well, the Indigenous (Cree) doctrine of *wâhkôtowin*, the laws concerning good relations, guided the Indigenous nations' affairs. These sacred laws or doctrines constitute indispensable components of the treaties. *Wâhkôtowin* and *Miyo-wîcêhtowin* together, are essential elements and core values, which Treaty First Nations continue to stress in understanding the undertakings and relationship of the Treaty parties<sup>54</sup>.

This positive undertaking of the parties to nurture and root their Treaty relationship in the principles of good, healthy, respectful relationships (*miyo-wîcêhtowin*) is symbolized by the laws governing relationships between family. The relationship with the Crown was expressed in terms of a perpetual familial relationship based on familial concepts defined by the First Nations principles of *wâhkôhtowin* (good relationships). These relationships were to be conducted and regulated by the principles and laws governing familial relationships (*wîtisânîhtowin*).<sup>55</sup> With the same force as common law judicial pronouncements, oral statements provided by Saskatchewan Treaty Elders evidence the Treaty doctrine in the following ways, Elder Simon Kytwayhat has stated, “When our cousins, the White man, first came to peacefully live on these lands (*e-wîtaskemâcîk*) with the Indigenous people. As far as I can remember, Elders have referred to them as “*kiciwâminawak*: (our first cousins). I have heard [from my Elders] that the Queen came to offer a traditional adoption of us as our mother. “You will be my

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<sup>53</sup> Cardinal, *Treaty Elders*, *supra* note 7 at 14.

<sup>54</sup> *Ibid* at 14-16.

<sup>55</sup> *Ibid* at 33.

children,” she said.”<sup>56</sup> Elder Peter Waskahat said, “And when this Commissioner Morris came here [in 1876], my Elder used to tell me ... he came here to offer himself to be our first cousin, like Cree – *niciwâm*.”<sup>57</sup> Elder Danny Musqua has stated, “The Queen has adopted [First Nations] as children...a joint relationship will come out of that. And so we have a joint relationship with the Crown because the Queen is our new mother.”<sup>58</sup> Elder Jimmy Myo confirmed, “They said, we came here as your relatives, They said, the Queen sent us here, the Queen wants to adopt you Indians...as her own children.”<sup>59</sup> Elder Alma Kytwayhat recalls that she was taught. “It was the [Queen] who offered to be our mother and us to be her children and to love us in the way we want to live.”<sup>60</sup> The use of these familial terms to describe the treaty relationship between the Queen and Indigenous Nations meant that the relationship would follow the Indigenous rules and laws governing “*wâhkôhtowin*” (good relationships). This doctrine and law of relationships is similar in the various Treaty First Nations.

#### **1.4.3 *Kihci-asotamâtowin –The Treaty Sovereigns’ Sacred Undertakings to one Another***

Expressed throughout this chapter are the core tenets of the Treaty order that establish the sacred nature of the Treaty agreements entered into by two sovereign nations. Both of these nations were foreign to each other and through ceremonies and negotiations, made solemn undertakings. The undertakings are made part of the Treaty doctrines through oral evidence of the Treaty Elders. The undertakings between the sovereigns are considered sacred and inviolable. The sacred and inviolable nature of the Treaties has been unequivocal by Treaty First Nations expressed in Treaty orders and doctrines. Both sovereign nations understood the sacred and inviolable nature. British law has also recognized the sacred and inviolable nature of treaties. The court in *Campbell v. Hall*,<sup>61</sup> held, “The articles of capitulation upon which the country is surrendered and the articles of peace by which it is ceded, are sacred and inviolable according to their true

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<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid* at 34.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> *Campbell v Hall*, (1774) Lofft 655 1 Cowp. 204 (Eng. K B) [*Campbell v Hall*].

intent and meaning."<sup>62</sup> Canadian jurisprudence has also recognized that sacredness of Treaty, "It must be remembered that a treaty is a solemn agreement between the Crown and the Indians an agreement the nature of which is sacred;"<sup>63</sup> "... a treaty represents an exchange of solemn promises between the Crown and the various Indian nations, it is an agreement whose nature is sacred."<sup>64</sup>

The sacred undertakings provided a delegation of responsibilities, obligations and in some cases, specific delegation of Treaty authority by each Treaty First Nation to the Crown. The authority delegated was specific and limited with the Treaty First Nations retaining and maintaining their legal and Constitutional orders. The British nation was permitted onto the land under certain conditions contained in Treaty; however, their authority was strictly limited to the scope of the taking up clauses in the Treaty. If no authority or power is delegated by the Treaty First Nations to the Crown, this power must be construed as reserved to Treaty First Nations. As such, these reserved powers are protected by imperial prerogative rights and the common law since neither sovereign can extinguish a foreign legal system.<sup>65</sup> As the treaties varied according to the time and geographic areas, some were strictly a political alliance for trade and made no assignment of Crown administration.<sup>66</sup> Others explicitly provided for some degree of Crown administration and Canadian jurisdiction in the shared territory. For example, treaties made after confederation provided limited and narrow law-making authority to the Crown.<sup>67</sup> The Treaty First Nations authorized Crown control over alcohol but retained their continued authority over the harvesting of natural resources in the ceded territory.<sup>68</sup> In some cases, they delegated limited authority over protecting game by regulation to either the federal dominion or the government of the country.<sup>69</sup> The Treaty First Nations

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<sup>62</sup> *Ibid* at 208.

<sup>63</sup> *Sioui*, *supra* note 29 at para 41.

<sup>64</sup> *Badger*, *supra* note 9 at para 52.

<sup>65</sup> Henderson, "Treaty Federalism", *supra* note 24 at 268, Indigenous and British Nations were foreign nations and upon entering Treaty retained their autonomy and laws. Chapter 2 of this thesis addresses that issue.

<sup>66</sup> *Ibid*.

<sup>67</sup> *Ibid*.

<sup>68</sup> Treaties 2, 4, and 6.

<sup>69</sup> *Ibid*.

understood and agreed to honour, as intrinsic to the treaty, to maintain peace and good order but did not delegate the ability of the British Queen to legislate over them. Different degrees of British authority, as part of good relations, and living together harmoniously, were authorized. However, as autonomous nations, they agreed to only specific authority and retained all inherent legal authority to the territory. The scope of the sacred undertakings has become an extremely contentious issue due to the failure of the implementation of the undertakings and the desecration of the basic foundation of the relationship.

#### **1.4.4 *Wîtaskêwin – The Doctrine of Living Together on the Land***

The Treaty order brought together foreign nations that entered into agreements to live on the land together. The Indigenous nations allowed for the peaceful taking up of foreign British subjects by the consultation and consent of the Indigenous Nations. The Treaty principles of mutual sharing are rooted in the inherent laws of the Treaty First Nations of certain Treaty delegations that expressed limited sharing of the land and ensured the Indigenous Nations continued survival. In Indigenous law, the sharing arrangement required the consultation and consent of the parties but also the sanction of the Creator. Treaty law provides the contextual framework for the Treaty First Nations' understanding of the collective and individual relationships created by Treaty. These Treaty Nations' conceptual foundations speak to the ideals, norms, values, and principles that informed and guided the conduct of the Treaty Nations at the time the treaties were negotiated. Non-interference, peaceful co-existence and limited delegations of mutual right are implicit in the doctrine of *wîtaskêwin*. The sacred and inviolable treaties were not meant to be land sales or purchases but a structure for creating political, economic and social associations between Indigenous and European sovereigns.<sup>70</sup> They represent a Indigenous conceptual framework for understanding First Nations' notions of inter-nation relationships, their civic duties and responsibilities.<sup>71</sup> They were also the Imperial law, a Magna Carta of the Treaty Nation.

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<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid* at 38.

The numbered treaties contained the ambiguous text "cede, release, surrender, and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen, and Her successors forever, all their rights, titles and privileges whatsoever, to the lands." Other treaties use the words "we transfer, surrender and relinquish" to her Majesty the Queen for the use of the Government of the Dominion. These treaties of cession are not purchases of Aboriginal land tenures by the Imperial Crown under the terms of the *Royal Proclamation, 1763*. Oral evidence by Treaty First Nations people has been very clear that the words evidenced a transfer of Aboriginal tenure to the protection of the Crown consistent with the idea of shared territorial jurisdiction. In fact, the sale of land is against the legal orders of Indigenous people, as the land was not theirs to sell as it belonged to all living things, birds, animals and trees.<sup>72</sup> The sacred Treaties provided for a division of authority between the Treaty signatories and reinforced their intent that any cession was of a protective, not proprietary, nature. The Indigenous nations did not transfer all the interests in the land. In actuality, the transfer is similar to placing the land in an imperial escrow account.<sup>73</sup>

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<sup>72</sup> See Henderson, "Treaty Federalism," *supra* note 24 at 262-265, where Professor Henderson points out that there are five other conditions in the treaties that lend support to an argument for a continuing Aboriginal self-determination over the land and against its sale and purchase. He states, "*First*, there were no words of consideration or purchase price in the document. *Second*, these treaty cessions were not absolute since they were conditional. The validity of a cession depended on full compliance with the promises, obligations and with the rendering of services. *Third*, as part of the continuing Aboriginal governmental authority in the ceded territory, the Chiefs agreed not to molest the person or property of any inhabitant of the ceded territory or any property of Her Majesty. This condition assures the quiet enjoyment of settlers and against a blanket purchase of the land by the Crown. It also demonstrates that any proprietary interest of the inhabitants and the Crown were under Aboriginal tenure and political jurisdiction. The quiet enjoyment of the settlers is related to the explicit purposes of settlement and trade as described in the treaties, not to absolute Crown authority. *Fourth*, under their jurisdiction the Chiefs and Headmen agreed not to interfere with or trouble any person passing or travelling through the ceded territory. These provisions illustrate the Aboriginal peoples' right to control the ceded territory after the treaties and also protect minority interests within the ceded land. *Fifth*, the Crown agreed that the Chiefs and Headmen would continue to maintain "peace and good order" in the ceded land among all inhabitants. This allocation of authority created a distinction between title and government in the ceded land that defeats any purchase theory. The Crown may have had a protective title, but the Chiefs and Headmen had jurisdiction over the ceded land."

<sup>73</sup> Henderson, "Treaty Federalism", *supra* note 24 at 265 notes that the assignment of land from the Treaty First Nation is analogous to the Crown's creation of derivative estates out of its original tenure in England. In English law, the King reserved some of the land for his estates while allowing others to use the land in exchange for certain services and taxes. In the treaties,

Henderson notes, “Under a treaty of cession, an Imperial Crown may have had an international and ultimate pre-emptive interest in ceded territory under the take-up clause, as against other European nations and peoples, but this future interest had no effect on Indigenous dominion.”<sup>74</sup> By accepting any transfer of jurisdiction or territory from a Treaty First Nation, the Crown also accepted of a *sui generis* or Imperial fiduciary obligation to fully comply with the terms of the Treaties.<sup>75</sup> Treaty First Nation people agreed to allow peaceful coexistence by honouring the Treaty rights of the British subjects, but by virtue of their continuing sovereignty, continuing legal and Constitutional order and right to self-govern, Treaty First Nations peoples could live as such in both the reserved and ceded Territories. The British Crown and their subjects, on the other hand, could not do anything they were not authorized to do under Treaty. The Treaties guaranteed non-interference with the Treaty First Nations’ continued ability to hunt, fish, gather, trade and to live as they have always lived.<sup>76</sup> Further, the Crown promised annual distributions, in perpetuity of food, clothing, ammunition, tools, education, health care, and a sharing of resource revenue.<sup>77</sup>

#### **1.4.5 *Pimâcihowin – The Doctrine of Making a Living***

Indigenous legal orders reflect a fundamental connection to the land that contain elements of spiritual, physical, and economic imperatives. This connection is rooted in the Cree concept and doctrines related to *pimâtisiwin* (life). It is a concept that encompasses *pimâcihowin*, (the ability to make a living). Regarding *pimâcihowin*, the Treaties guarantee the continuing rights of Indigenous Nations’ livelihoods, and the continuing right of Treaty First Nations to maintain a continuing relationship to the land and its resources. The land (*askiy*) is an important source of life and provides for the physical, material, and economic survival of people. *Pimâcihowin* is a holistic concept that includes a spiritual, physical and economic dimension. It is an integral component of

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the First Nations reserved land for themselves and their guests, and they delegated other lands to the Crown to generate taxes and revenues to finance the treaty obligations of the Crown.

<sup>74</sup> *Ibid* at 263.

<sup>75</sup> *Ibid* at 263.

<sup>76</sup> Treaties 3, 4, 5, 6, 7, 8, 9, 10, 11.

<sup>77</sup> *Ibid*.

Indigenous doctrines, laws, principles, values, and teachings regarding the sources of life, the responsibilities associated with them, including those elements seen as necessary for enhancing the spiritual components of life and those associated with making a living.<sup>78</sup>

The Treaty order continued the harmonious, yet limited sharing of an immense and abundant territory. Indigenous nations were guaranteed the right to continue of their way of life and the right to sustain themselves either in their hunter-gatherer economy or by adopting aspects of the settlers' economy by receiving the necessary training and implements. The court has found that the treaties were agreements of reconciliation and mutual advantage<sup>79</sup> and agreements to share the land under certain conditions. The sharing of the land and the precept of living together on the land includes the right of managing the uses of the land. As independent and sovereign Indigenous nations, there is an implicit right to determine and manage the land and the natural resources within their territory. As an international precept, Indigenous nations have a right to their natural resources and a right not be deprived of their own means of subsistence.<sup>80</sup> Since time immemorial Indigenous nations have always been the stewards and keepers of the land. The court in *Sioui* recognized continued Treaty ownership over the lands and held, "The British Crown recognized that the Indians had certain ownership rights over their land ... [and] allowed them autonomy in their internal affairs, intervening in this area as little as possible."<sup>81</sup>

#### **1.4.6 *Tâipymônwin : Mutual Consent in the Treaty Order***

The Treaty relationship created a new normative order of exclusivity between the sovereign and consenting parties. Treaties were consensual acts established by mutual

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<sup>78</sup> Cardinal, "Treaty Elders", *supra* note 7 at 43.

<sup>79</sup> *Marshall*, *supra* note 9 at para 3.

<sup>80</sup> Article 1(2), *International Covenant on Civil and Political Rights*, Adopted by the General Assembly of the United Nations 19 December 1966, states, "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."  
<<http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>>, See also, *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA Res 61/295, UN Doc A/RES/61/295 (13 Sept 2007) (2007) 46 ILM 1013.

<sup>81</sup> *Sioui*, *supra* note 29 at 1055.

agreements. As autonomous sovereigns, the Treaty parties worked out a Constitutional relationship in Imperial law that retained their respective autonomy. Thus, the Imperial Crown and Treaty First Nations through the Treaties created public, international and imperial Constitutional rights by mutual consent.<sup>82</sup> Treaty created consensual obligations under their respective authority as nations. It created a responsibility for the Treaty partners to act in each other's best interest.<sup>83</sup> The relationship between the Indigenous Treaty nations and the Crown was premised on mutual consent between sovereigns. Cree laws refer to this mutual consent as *Tâipymôwin*. Consent of a party to any agreement is a fundamental doctrine in the Treaty Order. Consent is implicit in the consensual agreements made and the relationship between two sovereign nations that was sanctioned by the Creator as the higher power. Treaty Elders are steadfast, throughout the generations, that consent of the parties to the Treaty agreement is a mandatory requirement and a basic tenet of natural justice. Mutual consent is also a tenet in International law. International Law and the law of nations adhered to the principal of compliance and fidelity to Treaties that are derived by fundamental principles of mutual consent. Henderson in "Treaty Rights in the Constitution of Canada" notes that Article 26 of *The Vienna Convention on the Law of Treaties* has held: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."<sup>84</sup> As well, in *Campbell v. Hall*, "The articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning."<sup>85</sup>

During Treaty negotiations, Treaty Commissioners assured the Indians that the Queen, "Is always just and true, what she promises never changes"<sup>86</sup>; "The Queen always keeps her word, always protects her red men"<sup>87</sup>; I have told you before and I will tell you

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<sup>82</sup> Henderson, "Treaty Rights" *supra* note 52 at 3.

<sup>83</sup> *Ibid* at 151.

<sup>84</sup> *Ibid* at 849, citing *The Vienna Convention on the Law of Treaties*, 1969, UN Doc. A/CONF. 39/27 at 289, codifies the law and obligations of agreements made between states.

<sup>85</sup> *Campbell*, *supra* note 61.

<sup>86</sup> Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North West Territories*, (Toronto: Belfords, Clarke and Co., 1880, reprint Saskatoon: Fifth House Publishers, 1991) at 94 [Morris, *Treaties of Canada*].

<sup>87</sup> *Ibid* at 95.



again that the Queen cannot and will not undo what she has done”<sup>88</sup>; “Every promise will be solemnly fulfilled as certainly as the sun now shines down upon us from the heavens.”<sup>89</sup> Indeed, the fidelity of the spoken word in the presence of Creator induced and led the Treaty First Nations to understand the Treaty promises as legally binding agreements, “As long as the sun and moon shall endure, as long as the Earth on which I dwell shall exist in the same State, you this day see it, so long will I be your friend and ally”<sup>90</sup>; “And in taking your hand, I hold fast all the promises you have made, and I hope they will last as long as the sun goes around and the water flows, as you have said”<sup>91</sup>; “For as long as the sun shines and the river runs”<sup>92</sup>; the treaties were to be honoured as long as the land is here, as long as the grass grows, as long as the river flows, as long as the sun rises in the east and sets in the west.”<sup>93</sup> Centuries later, in 1973, Queen Elizabeth II stated, “You may be assured that my Government of Canada recognizes the importance of full compliance with the spirit and terms of your Treaties.”<sup>94</sup>

## **1.5 INDIGENOUS CONSULTATION THROUGH TRADITIONAL LEGAL AND CONSTITUTIONAL ORDERS**

The concept of consultation may seem like a new and emerging responsibility in Canadian Constitutional law, but in Indigenous legal and Constitutional orders it is a fundamental structure supporting Indigenous societies and the treaty negotiations. Indigenous worldviews include a concept of the inter-connectedness of life that is meant to endure for generations. As part of Indigenous legal orders, Indigenous people have developed ways to ensure that the lands, waters and resources that have sustained past

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<sup>88</sup> *Ibid* at 105.

<sup>89</sup> *Ibid* at 275.

<sup>90</sup> Treaty of 1761, NSA, Vol 1 at 699-700.

<sup>91</sup> Morris, *Treaties of Canada*, *supra* note 86 at 16 and 51.

<sup>92</sup> *Ibid* at 234-235.

<sup>93</sup> *Ibid*.

<sup>94</sup> Statement of Queen Elizabeth II, July 5<sup>th</sup>, 1973, Calgary Alta., cited by Henderson, “Treaty Rights” *supra* note 52 at 852. In 1963, she made a similar statement to the Maori in New Zealand, “Whatever may have happened in the past and whatever the future may bring it remains the sacred duty of the Crown today as in 1840 to stand by the Treaty of Waitangi, to ensure that the trust of the Maori people is never betrayed.”

and present generations are passed on to future generations. These include ceremonies, songs and dances and stories that explain and reaffirm deep and abiding relationships with the lands, animals, waters, ancestral and spiritual worlds."<sup>95</sup> Indigenous nations incorporate the views and knowledge of individuals into collective decisions which ensure that lands, waters, resources and eco-systems are sustained for future generations.<sup>96</sup>

Indigenous legal and constitutional conventions ensure that the individual voices, observations and concerns are added to the collective body of knowledge for the preservation and protection of all. Consultation within Indigenous orders can include:

- Ceremonies such as Potlatches requiring members of communities and nations and neighbouring nations, to bear witness to the rights, privileges, and accuracy of interpretation and implementation of Indigenous peoples laws;
- Council fires and public forums that identify and resolve disputes, and provide a forum for the sharing and transmission of the values, beliefs, and laws of Indigenous people;
- Advice of elders, or community members with specific knowledge of territories or resources that allows Indigenous peoples to collectively ensure the protection of our living world;
- Diverse people with knowledge or responsibilities for specific areas or resources working with others within Indigenous nations and communities to ensure that territories are capable of sustaining all life, now and of being passed to future generations.<sup>97</sup>

Indigenous legal orders and systems operated through consensus and consultation among community members through traditional systems. These traditions incorporate the

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<sup>95</sup> Environmental-Aboriginal Guardianship through Law and Education (EAGLE), *Nation to Nation, The Law of Consultation and Accommodation*, Semiahmoo Reserve, Surrey B.C. Chapter 1 at 1-2.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

individual voice, observations and concerns into a collective body of knowledge for preservation and protection of all. Indigenous legal orders ensure environmental conservation and protection to meet short term needs with the long term view of preserving the integrity of lands, waters, resources and ecosystems.<sup>98</sup> As Indigenous territories are held communally, Indigenous legal orders allow for the consideration of both individual and community concerns to maintain the ecosystem which supports our collective survival.<sup>99</sup>

## 1.6 CONCLUSION

Indigenous nations are sovereign nations possessing legal and Constitutional orders which define their sovereignty, nationhood, laws, legal, social systems, jurisdictions and rights of citizens. Indigenous legal and Constitutional orders are the foundations of the authority, as sovereign nations, to negotiate the sacred and inviolable treaties. The British Queen's authority in foreign affairs recognized Indigenous legal orders and the nationhood as had the Indigenous nations recognized the British sovereignty. Entering into Treaty created an exclusive relationship whose basis was mutual consent.

The Treaty order is consensual nation-to-nation legal agreements where the Indigenous nations delegated certain responsibilities to the Queen. Under these reciprocal arrangements concerning a shared territory, the Queen promised assistance and protection. The relationship was of mutual and peaceful coexistence in a shared territory. Treaty Nations' law includes a close spiritual aspect, which included the Creator as a witness to the agreements.<sup>100</sup> The Indigenous nations understood that the Treaty parties would continue to be bound by the Creator's laws and the sacred undertakings made by the sovereigns. The Treaties represent a sacred status infused with political and legal

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<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> Cardinal, "Treaty Elders" *supra* note 7 at 1, "The elders made it clear that, in their view, those who seek to understand Indian Treaties must become aware of the significance of First Nations spiritual traditions, beliefs and ceremonies underlying the treaty making process."

aspects that is enduring for generations.<sup>101</sup> Treaty principles include the joint acknowledgment by the Treaty makers of the supremacy of the Creator; the maintenance of peace between the parties; the parties entering into a relationship based upon *wahkohtowin*, good relations; the guarantee of each other's survival and stability based on mutual sharing and the Indigenous Nations' continued right to livelihood.<sup>102</sup> The relationship was not an agreement to relinquish sovereignty, the land, nor was it an assent to domination. Instead, the Indigenous nations entered into a nation-to-nation, federal like, arrangement with the Queen, whereby the jurisdictions and responsibilities of the signatories were established, with sovereignty and jurisdiction of Treaty First Nations maintained. The *Royal Proclamation, 1763*, affirmed that relationship. Treaties were based solely on consultations and a consensual alliance and the consensual will of Indigenous nations. Based on these legal doctrines, they cannot be unilaterally changed or altered without the consultation and consent of both parties with the same deference with which they were signed.

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<sup>101</sup> Initially, the Treaty parties did not view the Treaty as legal rights to be enforced by the courts, instead it was an agreement that flowed from the relationship.

<sup>102</sup> Cardinal, "Treaty Elders", *supra* note 7 at 38.

## CHAPTER 2

### **KIHCI-ASOTAMÂTOWIN AND THE CROWN'S CONSTITUTIONAL DUTY TO IMPLEMENT THE SACRED AGREEMENTS**

*"You may be assured that my Government of Canada recognizes the importance of full compliance with the spirit and terms of your Treaties."*

*Queen Elizabeth II*<sup>103</sup>

#### **2.0 INTRODUCTION**

Indigenous Treaty nations are independent nations, freely associated states and distinct from European nations, settlers or colonists. Indigenous nations did not surrender either their autonomy or their legal and Constitutional orders when they entered the Treaty agreements. In fact, the mutual premise of the Treaties was the guarantee of the continued right of sovereignty, which was never surrendered. The authority of Indigenous nations derives directly from the consent of their citizens. Entering into Treaty placed Treaty First Nations under the protections of the Queen. As protected nations, Treaty First Nations were never subject to the authority of the imperial Parliament and remained as foreign jurisdictions under the Crown.<sup>104</sup> The sacred and inviolable treaties have generated both international and Constitutional obligations for their implementation on the Crown. This chapter frames the Crown's Constitutional obligation to implement the treaties.

#### **2.1 TREATY FIRST NATIONS AS SOVEREIGN NATIONS UNDER THE PROTECTION OF THE CROWN**

As autonomous nations exclusively occupying North America when the European nations arrived, they were foreign nations to the European nations. Treaty First Nations

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<sup>103</sup> Statement of Queen Elizabeth II, *supra* note 94.

<sup>104</sup> Henderson, "Treaty Federalism," *supra* note 24 at 257.

were protected nations under the British Queen but also remained foreign jurisdictions.<sup>105</sup> As explained in Chapter 1, the Treaties transferred Treaty implementation obligations to the Crown but were not grants of legislative power over the Indians. They remained autonomous yet protected nations. In 1870, the British Crown guaranteed the transfer of Rupert's Land to Canada protected the Indian Tribes, "It will be the duty of the government to make adequate provisions for the protection of the Indian Tribes, whose interest and wellbeing are involved in the transfer."<sup>106</sup>

The Crown has only the authority granted to it in Treaty and any power is limited to the scope of the agreements. Henderson in his article, "Treaty Federalism," notes, "If no authority or power is delegated to the Crown, this power must be interpreted as reserved to First Nations respectively and are protected by prerogative rights and the common law since neither can extinguish a foreign legal system."<sup>107</sup> He argues that the First Nations are properly considered as Foreign Nations under the *Foreign Jurisdiction Act, 1890*.<sup>108</sup> The *Foreign Jurisdiction Act* affirmed the separation between Treaty jurisdiction from parliamentary powers. The preamble of the *Act* confers the British Queen with "jurisdiction over Treaty and any country out of Her Majesty's domain ....as if Her Majesty had acquired that jurisdiction by the cession or conquest of Territory."<sup>109</sup> In effect, this means that First Nations were under the protection of the British Queen but not under its legislative authority under the terms of the peace and good order clause. They were immune from foreign powers and should have continued as separate and unique foreign nations. Fundamentally, this point has always been maintained by Treaty First Nations. Indigenous and Treaty First Nations are separate and autonomous nations possessing their own legal and Constitutional orders.

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<sup>105</sup> *Ibid* at 257, Henderson cites the *Foreign Jurisdiction Act, 1890*, where Foreign Jurisdictions are territory that is outside the Dominion, but are a protected state under Her Majesty, by virtue of a treaty or grant. Henderson notes that this argument has never been addressed by the courts nor has there been any compelling reason why First Nations should not have been considered foreign nations.

<sup>106</sup> *Order of Her Majesty in Council admitting Rupert's Land and North West Territory into Union, 1870* [UK] RSC 1985 Appendix II, No 9.

<sup>107</sup> Henderson, "Treaty Federalism" *supra* note 24 at 268.

<sup>108</sup> *Ibid* at 270, citing the *Foreign Jurisdiction Act, 1890*.

<sup>109</sup> *Ibid*, *Foreign Jurisdiction Act, 1890* at ss. 1 and 6.

The sacred and inviolable Treaties created a distinct legal category where Treaty First Nations were immune from Parliament's authority to pass legislation that was inconsistent with the treaties or any other authority it exercised over its own dominion, colonies or subjects. Thus, the political and legal relationship created by the Treaties was distinct and separate from the British Euro-political arrangements. As foreign nations to Indigenous nations, British legislation then could not be annexed into the shared or ceded territory or upon Indigenous governments without their consent.<sup>110</sup>

The *Royal Proclamation, 1763*, *The Rupert's Land Act, 1870* and the Victorian Treaties established Treaty First Nations' territory as an acknowledged and protected territory with its own Imperial Bill of Rights.<sup>111</sup> The Treaties and the *Royal Proclamation* together, protected First Nations' territorial jurisdiction. In order for First Nation territories to have been subject to Crown sovereignty, a formal annexation would have been required.<sup>112</sup> In Canada, prior to the 1982 Constitutional reform, none of First Nation territory was ever annexed to the British Crown. Treaty First Nations were under the protection of the British Crown and not as annexed nations.<sup>113</sup> Thus, the treaties, were treaties with Foreign countries under the protection of the British Queen pursuant to s. 132 of the *Constitution Act, 1867*.<sup>114</sup> It provided to the Federal government all powers necessary to implement the Treaties. Section 132 of the *Constitution Act, 1867*, states:

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<sup>110</sup> Henderson, "Treaty Federalism" *supra* note 24 at 257.

<sup>111</sup> Henderson, *Treaty Rights*, *supra* note 52 at 868, quoting a statement made by the Honourable Jean Chretien, Minister of Indian Affairs and Northern Development acknowledging the *Royal Proclamation* as a declaration of Aboriginal peoples rights to land. (August 8, 1973) at 2; Indian and Northern Affairs, Federal Policy for the Settlement of Native Claims (Ottawa: Indian and Northern Affairs, March 1993) at 1.

<sup>112</sup> Henderson, "Treaty Federalism" *supra* note 24 at 271, cites *Ex Parte Siskome*, [1910] 2 KB 576 (CA), where the Court of King's Bench held that until His Majesty and the African Chiefs agreed to an annexation of territory protected by a treaty, the territory remained a foreign country, to the surrounding dominions and administered by His Majesty's servants.

<sup>113</sup> *Ibid.*, *Ex Parte Siskome*, at 620, Kennedy L.J. held, "What the idea of a Protectorate excludes, and the idea of annexation on the other would include, is that absolute ownership [in the crown] which was signified by the word 'dominium' in Roman Law, and which, though perhaps not quite satisfactorily, is sometimes described as territorial sovereignty."

<sup>114</sup> Henderson, *Treaty Rights*, *supra* note 52 at 870, citing the *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, reprinted RSC 1985, App II, No 5.

The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligation of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.<sup>115</sup>

This provision provides direction for Canada to implement the Treaties and to ensure that its legislation accords with that Constitutional duty. Treaty First Nations, as foreign jurisdictions, were separate from the legislative or regulatory authority of the Imperial Crown. The Victorian Treaties allowed for the formation of western Canada and are the framework for British jurisdiction on the Treaty First Nation territory. British jurisdiction applied only to British subjects who were in the unpurchased Foreign territories belonging to the Indigenous Nations.<sup>116</sup>

## **2.2 CONSTITUTIONAL ENTRENCHMENT OF THE SACRED AND INVIOABLE TREATIES**

The amendment of the *British North America Act, 1867*<sup>117</sup> created Canada's *Constitution Act, 1982*, which is regarded as the supreme law in Canada.<sup>118</sup> The new Constitutional reforms were to have provided a fresh vision of Canada, independent from the British Crown, but yet still colonial in its underpinning. The repatriation of Canada's Constitution also meant that the Indigenous Treaty order was repatriated from imperial law to Constitutional law. The 1982 Constitutional amendments saw the incorporation of s. 35(1) of *The Constitution Act, 1982*, which provides, "existing aboriginal and treaty

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<sup>115</sup> *Ibid*, *Constitution Act, 1867*, s. 132.

<sup>116</sup> Henderson, *Treaty Rights*, *supra* note 52 at 853. Henderson notes that the Imperial instructions, proclamations, and legislation were addressed to the colonists who travelled in Indian Territory. The colonist had to adhere to those instructions and did not have an independent existence as First Nations.

<sup>117</sup> *The Constitution Act, 1867* (UK), 30 & 31 Vict. c 3 (formerly *The British North America Act, 1867*)

<sup>118</sup> Section 52(1) of the *Constitution Act, 1982*, *supra* note 38 provides: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." This is often called the supremacy clause. See also *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at 313 and *Hunter v Southam Inc.*, [1984] 2 SCR 145 at 148.



rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”<sup>119</sup> This affirmation of Treaty rights in the *Constitution Act, 1982*, has reaffirmed the Treaty order’s foundation to the creation of Canada and its converging role in shared governance.<sup>120</sup> It has not altered the structure of Canadian federalism but was meant to remedy the denial of Aboriginal and Treaty rights and recognize that Aboriginal people were already here living in distinctive cultures mandating special legal Constitutional status.<sup>121</sup> Through the inclusion of Aboriginal and Treaty Rights, a new Constitutional order was created.

English courts have confirmed the importance of the merging of the Treaty order in the repatriation of the Constitution. In *R v Secretary of State for Foreign & Commonwealth Affairs*, Lord Denning found that the *Canada Act, 1982*, carried a duty to solemnly respect Treaty rights and obligations,

It seems to me that the Canada Bill itself does all that can be done to protect the rights and freedoms of the aboriginal peoples of Canada. It entrenches them as part of the Constitution, so that they cannot be diminished or reduced except by the prescribed procedure and by the prescribed majorities ... Their rights and freedoms have been guaranteed to them by the Crown, originally the Crown in respect of the United Kingdom now by the Crown in respect of Canada but, in any case, by the Crown. No parliament should do anything to lessen the worth of these guarantees. They should be honoured by the Crown in respect of Canada so long as the sun shines and the river flows. That promise must never be broken.<sup>122</sup>

The importance of the constitutionalization of Aboriginal and Treaty rights in s. 35 was again commented on by the Supreme Court of Canada which held, “The promise of s. 35 as it was termed in *R v Sparrow* ... recognized not only the ancient occupation of land by Aboriginal peoples, but their contribution to the building of Canada and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved...reflects an important underlying constitutional

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<sup>119</sup> Section 35(1), *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), c 11.

<sup>120</sup> Henderson, *Treaty Rights*, *supra* note 52 at 821.

<sup>121</sup> *Van der Peet*, *supra* note 47 at 30.

<sup>122</sup> *R v Secretary of State for Foreign & Commonwealth Affairs* [1981] 4 CNLR 86 (Eng. CA) at 127 [*Secretary of State*].

value.”<sup>123</sup> The importance of treaty to the Constitution was reaffirmed in *Badger*, which held, “The treaties are an integral part of the fabric of our Constitution. They form the bedrock foundation of the relationship between the Treaty First Nations and the Government of Canada.”<sup>124</sup> It is from the treaties that all things must flow in the treaty relationship. They represent the common intersection both historically and politically between nations. They created a relationship which is perpetual and unalterable in its foundation principles. The treaties are the basis for a continuous intergovernmental relationship.”<sup>125</sup> The Crown in respect of Canada is the successor of the Imperial Crown and is charged with the imperial obligations to protect the Constitutional orders of First Nations<sup>126</sup> and did not create a new statement of rights but an affirmation of old imperial rights in the new Constitutional order.<sup>127</sup> Section 35 has brought Treaty and inherent Aboriginal rights in the Constitutional agenda and is the basis for Canada in re-examining its colonial narrative in all areas.

The inclusion of s. 35(1) in the Constitution was a result the vigorous negotiations of Indigenous groups in Canada in the face of entrenched colonial agenda's and a historical period where the honour of the Crown was not upheld and there was disregard of the Treaty obligations. The new Constitution laid a foundation and has potential for Canada to move beyond past transgressions of the Treaty order. Section 35 specifically directs and mandates recognition and affirmation of existing Aboriginal and treaty rights at every level of Canadian society, creating a new framework for interpretation of governmental responsibility and treaty rights in Canada.<sup>128</sup> In other words, s. 35 affirms the existence of Indigenous legal and Constitutional orders and positive law rights contained in the treaty order as enduring sources of Constitutional law.<sup>129</sup> Regrettably however, the final version of the Constitution did not explicitly include Indigenous legal and Constitutional orders as part of the division of powers and shared rule. Instead, ss. 91

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<sup>123</sup> *Quebec Secession Reference*, [1998] 2 SCR 217 (SCC)[*Quebec Secession*] at para 82.

<sup>124</sup> *Badger*, *supra* note 9.

<sup>125</sup> James Youngblood Henderson, "First Nations Jurisprudence and Aboriginal Rights, Defining a Just Society", Native Law Centre, Saskatoon, Saskatchewan (2006) at 34.

<sup>126</sup> Henderson, "Treaty Federalism", *supra* note at 24 .

<sup>127</sup> Henderson, *Treaty Rights*, *supra* note 52 at 5.

<sup>128</sup> Henderson, "Treaty Federalism," *supra* note 24 at 244.

<sup>129</sup> *Ibid.* See also John Burrows, "Canada's Indigenous Constitution", *supra* note 18.

and 92 of the *Constitution Act, 1867*, established an internal division of rule on the between the Provinces and the Federal Crown. The patriation of the Constitution in Canada occurred without the mutual consent of the Treaty First Nations, who did not consent to the altering of their relationship with the imperial Crown. Additionally, the process and language used in the patriation did not meet the rights guaranteed in Treaty.<sup>130</sup>

The consent of Indigenous nations to Treaty allowed for the creation of Canada and for the British to establish and enact constitutions with their colonies through British statutes. As stated earlier, Indigenous Nations possessed their own legal and Constitutional orders. However since the *Constitution Act, 1867*, did not specifically address the Treaties, the unwritten Constitutional practices guided Treaty implementation.<sup>131</sup> Accordingly, s. 91 (24) *Constitution Act 1867*, granted to Canada exclusive jurisdiction for “Indians and Land reserved for Indians”<sup>132</sup> and embedded responsibility and transfer of administrative duties of Treaty implementation. The transfer is analogous to a constitutional encumbrance and was of an *administrative* nature and not a transfer of legislative power.<sup>133</sup>

The *Constitution Act, 1867* delegated s. 91 (24) and s. 132 the necessary powers to perform the Treaty obligations with foreign countries to Canada, including the Treaty obligations in the *Foreign Jurisdiction Act*.<sup>134</sup> Henderson in “Empowering Treaty Federalism”, posits that all the Constitutional obligations of treaty implementation could be fulfilled through federal statutes by the Federal government’s power “to make laws for

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<sup>130</sup> *Secretary of State*, *supra* note 122. An application to the United Kingdom Secretary of State requested clarification of whether the United Kingdom or Canada has the responsibility of Treaty. The Secretary replied that all Treaty obligations became the responsibility of Canada with the attainment of independence. The Treaty First Nations then sought a declaration that treaties or other obligations entered into by the Crown to the Indian peoples of Canada are still owed by Her Majesty in right of Her Government in the United Kingdom and that the denial of such responsibility by the Secretary of State was incorrect. The court ruled that the responsibilities of the Imperial Crown were incrementally transferred to Canada by Imperial Acts from 1867 to the *Statute of Westminster, 1931*.

<sup>131</sup> Henderson, “Treaty Federalism”, *supra* note 24 at 272.

<sup>132</sup> *Constitution Act, 1867*, s. 91(24), *supra* note 45.

<sup>133</sup> Henderson, *Treaty Rights*, *supra* note 52 at 864.

<sup>134</sup> *Ibid*, *supra* note at 854.

peace order and good government of Canada.”<sup>135</sup> However, the Federal Parliament interpreted their responsibilities without due regard to their Treaty implementation obligations, further, they completely ignored s. 132.<sup>136</sup> The government of Canada would not read their obligations for Treaty implementation into the interpretation of s. 91(24), despite their obvious obligations to uphold their lawful responsibilities in treaty. The Canadian government did not provide direction, legislation or even policy on Treaty implementation although Canada possessed the administrative authority granted to them in Treaty.<sup>137</sup> The Federal government’s responsibility was to implement the sacred treaties and its lawful promises, as clearly, both the current Federal and Provincial governments are beneficiaries and agents of the British Crown in Treaty implementation.

The sacred and inviolable treaties created binding obligations on the Crown for their immediate implementation. The court in *Sundown* held, “Treaties may appear to be no more than contracts. Yet they are far more, They are solemn exchange of promises made by the Crown and various First Nations.”<sup>138</sup> Then the court in *Badger* has held that treaties, “create enforceable obligations based on the mutual consent of the parties.”<sup>139</sup> In *Sioui*, the court also affirmed that the Treaty promises are rights which are “mutually binding obligations”<sup>140</sup> and in *Simon*, the court has held that treaty promises are ‘binding obligations which would be solemnly respected.’<sup>141</sup> Treaty rights are guarantee’s<sup>142</sup> which should be “honoured by the Crown in respect of Canada and never be broken,<sup>143</sup> and “no parliament should do anything to lessen the worth of these guarantee’s.”<sup>144</sup>

Entrenching Treaty rights into the Constitution requires a blending of Constitutional rights and powers with the Treaty nations. It does not mean assimilation of

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<sup>135</sup> Henderson, “Treaty Federalism” *supra* note 24 at 275.

<sup>136</sup> *Ibid* at 865.

<sup>137</sup> *Ibid* at 867.

<sup>138</sup> *R v Sundown*, [1999] 1 SCR 393 (SCC) at para 24 [*Sundown*].

<sup>139</sup> *Badger*, *supra* note 9 at 401.

<sup>140</sup> *Sioui*, *supra* note at 1044.

<sup>141</sup> *R v Simon*, [1982] 2 SCR 387 (SCC) at 401 and 410 [*Simon*].

<sup>142</sup> *Ibid* at 99.

<sup>143</sup> *Ibid*.

<sup>144</sup> *Ibid*.

Indigenous legal orders but rather to implement the Treaty rights into a equal way as the common law and French civil law are respected in Canada.<sup>145</sup> Section 35 provides an avenue to create an innovative theory of Constitutional supremacy.<sup>146</sup>

## 2.3 THE TREATY ORDER AND CONSTITUTIONAL SUPREMACY

Constitutional entrenchment of Aboriginal and Treaty rights placed Indigenous orders within the framework of Constitutional supremacy. Section 52(1) of the *Constitution Act, 1982* provides: “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”<sup>147</sup> The consistency principle of Constitutional supremacy ensures that legislation is consistent with the Constitution, including the unwritten principles that framed the Treaties.<sup>148</sup> The principles of supremacy include a relationship with all of the parts of the constitution without one section taking precedence over any others. This means that the determination and legitimacy of all exercises of executive and legislative power derives from the Constitution. Government executive and legislative actions must be harmonized with both the principles of the Constitution and the rule of law. Unilateral power asserted by Governments over Treaty nations is contrary to the terms of the Treaty and principle of Constitutional supremacy.<sup>149</sup> The court in *Manitoba Language Rights*<sup>150</sup> confirmed that any law that is not consistent with the Constitution is of no force or effect, thereby ensuring that Constitutional law prevails over the laws in Canada.<sup>151</sup> Consequently, the

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<sup>145</sup> Henderson, *Treaty Rights*, *supra* note 52 at 821.

<sup>146</sup> *Ibid* at 823, Professor Henderson states that Constitutional convergence can create an innovative theory of constitutional supremacy, constitutional equality, constitutional non-derogation of treaties, the consistency test for ordinary legislation and constitutional inter-delegation of Treaty delegations.

<sup>147</sup> *Constitution Act, 1982*, s. 52(1) *supra* note 38.

<sup>148</sup> Henderson, *Treaty Rights*, *supra* note 52 at 824.

<sup>149</sup> *Ibid*.

<sup>150</sup> *Manitoba Language Rights*, [1985] 1 SCR 721 (SCC) at 744-47.

<sup>151</sup> *Ibid*. “... [t]he Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government. It is, as s. 52 of *The Constitution Act, 1982* declares, the ‘supreme law’ of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it. The duty of the judiciary is to interpret and apply the

courts must ensure that Canada and the Provinces do not legislate beyond their authority delegated by the Treaties.

The principle of Constitutional supremacy provides constitutional limitations for Parliament's exercise of its constitutional powers. Constitutional supremacy requires a paradigm shift where s. 35 rights mandate constitutional deference to treaty rights in the highest order. Constitutional supremacy, the rule of law, and the non-derogation clause of s. 25 of the *Charter*,<sup>152</sup> provide explicit protection of Treaty rights. Constitutional supremacy and the rule of law require the implementation of Treaty rights. Constitutional supremacy obliges the Government to safeguard Indigenous orders and requires Constitutional law be consistently applied in legislation, administration, and adjudication. It requires the Government to depart from familiar colonial and patriarchal values to protect people of various social status, class, race or gender. It requires a balancing of plural sources of Constitutional power and protects against unjustified legislative infringement.<sup>153</sup>

## **2.4 LEGISLATION AND THE TREATY ORDER**

As a direct result of Government's failure to implement the obligations of treaty rights through legislative form or through Schedule 1 of the *Constitution Act, 1982*, the courts have been left to the task of interpreting the Treaty agreements. The failure of the governments to honour their treaty agreements has resulted in that responsibility being left to the courts and represents a national travesty of the very foundation which this country was built. Much like the common law treatment of Aboriginal rights, Treaty rights are not recognized in the common law until they have passed the court's Eurocentric tests. The Crown's ability to extinguish Treaty rights and the court's tests

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laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails."

<sup>152</sup> Section 25 of the *Constitution Act, 1982* states that the provisions of the *Charter of Rights and Freedoms* cannot abrogate the Aboriginal, treaty or other rights and freedoms that pertain to the Aboriginal people of Canada and although the Constitution is subject to a *Charter* review, it cannot abrogate or derogate from rights in the *Constitution, 1867*.

<sup>153</sup> Henderson, *Treaty Rights*, *supra* note 52 at 855.

requiring proof the existence of the Treaty and justified infringement test have created a contradiction where the Crown is both a protector and a threat to Treaty Nations' Constitutionally protected rights.

Prior to Constitutional entrenchment under colonial law, Treaty Rights were vulnerable to unilateral extinguishment and unjustified infringement by governments. The court decisions of that era reflected bias and institutionalized racism. In *R v Syliboy*,<sup>154</sup> the court declared, "The savages right of sovereignty even of ownership were never recognized." The court in *Moosehunter v The Queen*<sup>155</sup> stated, "The Government of Canada can alter the rights of Indians granted under treaties, Provinces cannot". In *Sikyey v The Queen*,<sup>156</sup> the court held that notwithstanding the rights in Treaty 11, the *Migratory Bird's Convention Act* applied. This result was also affirmed in *R v George*<sup>157</sup> and *Daniels v White*.<sup>158</sup> As well, in the Robinson Annuities, the Privy Council stated that an Indian treaty was a mere promise and agreement and the duty to compensate was merely a personal obligation by the governor. In *R v Wesley*,<sup>159</sup> and *Pawis v The Queen*<sup>160</sup> the court held that Treaties were merely a contract. In *R v Taylor*, the courts disallowed an interpretation where a treaty was negotiated by the Crown in the context of grossly unequal bargaining positions.<sup>161</sup>

Yet the courts have allowed federal acts and other government instruments to modify or suspend some Treaty obligations. These decisions assert the Treaties are governed strictly by Canadian law, not law compatible with both nations. In British Constitutional traditions, any act of Parliament could be repealed by a subsequent act, thus the court presumed the Treaties could be amended or extinguished by subsequent

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<sup>154</sup> *R v Syliboy*, [1929] 1 DLR 307 (NS Co Ct) at 313 [*Syliboy*] in *Simon*, *supra* note 141, Chief Justice Dickson characterized this decision as a biased product of another era in Canadian Law that is inconsistent with a growing sensitivity to native rights in Canada.

<sup>155</sup> *Moosehunter v The Queen*, [1981] 1 SCR 282 at 293, [1981] 1 CNLR 61 [*Moosehunter*].

<sup>156</sup> *Sikyey v The Queen*, [1964] 43 DLR (2d) 150 (NWTCA), *aff'd* [1964] SCR 642 [*Sikyey*].

<sup>157</sup> *R v George*, [1966] SCR 267 at 281 [*George*].

<sup>158</sup> *Daniels v White*, [1968] SCR 517 [*Daniels*].

<sup>159</sup> *R v Wesley*, [1932] 4 DLR. 774 (Alta SC) [*Wesley*].

<sup>160</sup> *Pawis v The Queen* (1979), [1980] 2 FC 18 at 24-25 (FCTD) [*Pawis*] held that the Robinson-Huron Treaty was a contract.

<sup>161</sup> *R v Taylor*, [1981] 3 CNLR 114 at 123 (Ont CA) [*Taylor*].

federal statute or agreements. The unilateral extinguishment of Treaty rights was not consented to or authorized by the Treaty agreements. Treaty authorized only limited and specific authority in the agreements but unilateral extinguishment, or infringement, were contrary to treaty governance. There was no legislative authority, independent of the treaties, of any foreign governments authority over Treaty First Nations. As the *Royal Commission on Aboriginal Peoples* concluded:

According to the courts, prior to the constitutional reforms of 1982, Aboriginal treaties could be amended or overridden by federal statute, without the agreement of Aboriginal parties. This viewpoint was consistent with British constitutional traditions, under which even such fundamental documents as [the] Magna Carta could be repealed by a simple act of Parliament. However it did not correspond to Aboriginal conceptions of the treaties, which were viewed as sacred pacts, not open to unilateral repeal.<sup>162</sup>

The burden to prove the existence of a Treaty right falls upon the Treaty First Nation person and fails to accord to the consensual agreements made. According to the court in *Sioui*<sup>163</sup> and *Simon*,<sup>164</sup> the test to prove a common law Treaty right includes:

- (1) Proof of Party to the Treaty – The parties must be the Crown and an Aboriginal Group;
- (2) Authority – The signatories to the treaty must have the authority to bind their principals, the Crown and Aboriginal group;
- (3) There must be proof that the parties intended to create legally binding obligations; The obligations must be assumed by both sides, so the agreement is a bargain; and
- (4) There must be a certain measure of solemnity.<sup>165</sup>

The *Sioui* court identified five factors relevant in determining the intent of the parties to enter a treaty: the continuous exercise of a right in the past and at present; the reasons as to why the Crown made a commitment; the situation prevailing at the time the document was signed; evidence of relations of mutual respect and esteem between the signatories;

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<sup>162</sup> RCAP *Final Report* Vol. 2, *supra* note 42.

<sup>163</sup> *Sioui*, *supra* note 29.

<sup>164</sup> *Simon*, *supra* note 141.

<sup>165</sup> Peter Hogg, *Constitutional Law of Canada*, 5th ed. Supplemented (Toronto: Carswell, 2007) at 28.



and the subsequent conduct of the parties.<sup>166</sup> In the common intention test, the Indigenous understandings must be weighed against the Crown understandings.<sup>167</sup> The court has held in Treaty interpretation, that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing.”<sup>168</sup> In litigation both past and present, parties have disputed the promises made and the promises understood.<sup>169</sup> Leonard Rotman has observed, "The Canadian judiciary recognized that treaties between representatives of the Crown and Aboriginal nations ought not to be governed by the ordinary principles of interpretation that are applicable to other agreements, such as private contracts or international treaties.”<sup>170</sup> Greater emphasis began to be placed on methods of construing treaties that would give a more accurate portrayal of the agreements between the Crown and Indigenous peoples so that the promises made would be recognized and enforced by the courts. Current interpretations find government and courts in a positivist, literal interpretation, while Indigenous people view treaties as sacred, holistic and evolving.<sup>171</sup> The interpretive canons were intended to provide a fair a just guide.<sup>172</sup>

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<sup>166</sup> *Sioui*, *supra* note 29; see also *R v Taylor and Williams*, [1981] 3 CNLR 114 (Ont CA) leave to appeal ref'd [1981] 2 SCR [Taylor and Williams].

<sup>167</sup> *Sioui*, *supra* note 29.

<sup>168</sup> *Mikisew Cree* *supra* note 5 at para 29.

<sup>169</sup> See, for example, *Benoit v Canada* [2003] 3 CNLR 20 [Benoit]. During the Treaty 8 negotiations several promises were made by the Treaty Commissioners to the Treaty 8 people with the urgent objective to have the treaty signed. Some of these promises were written in the Treaty text but many more took place during verbal negotiations and after the Commissioners had already drafted the document. The Commissioners assured the Indians that the treaty did not open the way to the imposition of any tax and this verbal promise was contained in the report by the Treaty Commissioners presented to Parliament. However, in dismissing the appeal, the Court of Appeal limited itself to a narrow issue of whether the trial judge erred in finding that the Aboriginal signatories had misunderstood what the Treaty Commissioners told them. The judgment was filled with disdain over the Aboriginal oral evidence and quickly disposed of the matter by ruling there was insufficient evidence of Aboriginal understanding that they would be exempted from taxation but completely ignored the single most important piece of evidence, the Treaty Commissioners Report.

<sup>170</sup> Leonard R. Rotman, "Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence" (1997) 46 UNBLJ 11-50 at 11 [Rotman, "Taking Aim"].

<sup>171</sup> Thomas Isaac and Kristyn Annis, *Treaty Rights in the Historic Treaties of Canada* (Saskatoon: Native Law Centre University of Saskatchewan, 2010) at 3.

<sup>172</sup> Rotman, "Taking Aim", *supra* note 170 at 20.

The principles governing treaty interpretation were articulated by McLachlin J, in the *Marshall No.1*<sup>173</sup> decision:

1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation: *R. v. Sundown*, [1999] 1 S.C.R. 393, at para. 24; *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 78; *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1043; *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 404. See also: J. [Sákéj] Youngblood Henderson, “Interpreting Sui Generis Treaties” (1997), 36 Alta. L. Rev. 46; L. I. Rotman, “Defining Parameters: Aboriginal Rights, Treaty Rights, and the Sparrow Justificatory Test” (1997), 36 Alta. L. Rev. 149.
2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories: *Simon*, supra, at p. 402; *Sioui*, supra, at p. 1035; *Badger*, supra, at para. 52.
3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed: *Sioui*, supra, at pp. 1068-69.
4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed: *Badger*, supra, at para. 41.
5. In determining the signatories’ respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties: *Badger*, supra, at paras. 52-54; *R. v. Horseman*, [1990] 1 S.C.R. 901, at p. 907.
6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time: *Badger*, supra, at paras. 53 et seq.; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36.
7. A technical or contractual interpretation of treaty wording should be avoided: *Badger*, supra; *Horseman*, supra; *Nowegijick*, supra.
8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what “is possible on the language” or realistic: *Badger*, supra, at para. 76; *Sioui*, supra, at p. 1069; *Horseman*, supra, at p. 908.
9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty

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<sup>173</sup> *Marshall*, supra note 9 at 52.

right in its modern context: *Sundown*, supra, at para. 32; *Simon*, supra, at p. 402.<sup>174</sup>

Brian Slattery notes the paradox of Indigenous people having to prove their inherent rights in accordance with the Canadian viewpoint,

the Crown's acquisition of sovereignty over Indigenous peoples and their territories gave rise to Aboriginal rights in the Common Law of Canada. These rights continue to exist in their original form unless or until extinguished by legislation, voluntary surrender or other valid process. As legal rights, Aboriginal rights are cognizable and enforceable in Canadian courts. However, Aboriginal peoples have to prove the existence of these rights on a case by case basis in order to gain judicial protection.<sup>175</sup>

Standing alone, judicial interpretative principles of Treaty are both piecemeal and unacceptable. The failure of the Crown to implement Treaty allows the validity of the Treaty to be determined by the courts in a manner that refuses to provide the full spirit and intent. Although the court has expressed some sympathy toward the plight of Indigenous people, as stated in *Pasco v. Canadian National Railway Co.*, "We cannot recount with much pride the treatment accorded to the native people of this country,"<sup>176</sup> the court has not been able to extract themselves from a colonial paradigm. The full engagement of the Crown is required to fulfill their promises in manner which incorporates the restoration of the Indigenous and Treaty order of consensual nation-to-nation agreements that cannot be altered or infringed without full consultation and consent. The Treaty agreements, Indigenous and Treaty orders and law, and the Crown through the Treaty Commissioners, established the continued process of consultation, it has just been ignored.

The principles of Treaty interpretation and Treaty rights are Constitutionally binding obligations upon the Crown and its agents. The Treaty agreements are Treaty law, and described by Professor Brian Slattery, "It seems clear that the historic treaties are governed, neither by English Common law nor Aboriginal customary law, but by a

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<sup>174</sup> *Ibid* at 52.

<sup>175</sup> Brian Slattery, "Aboriginal Rights and the Honour of the Crown", (2005) 29 SCLR at 434.

<sup>176</sup> *Pasco v Canadian National Railway Co*, [1986] 1 CNLR 35 (BCSC) at 37.

unique body of law that forms a branch of the doctrine of Aboriginal rights.”<sup>177</sup> As constitutional principles, the interpretations provide guidance in interpreting the Treaty order.

## **2.5 UNILATERAL INFRINGEMENT OF THE SACRED AND INVOLABLE TREATIES**

The court in *Sparrow* set out a framework for the justification of the infringement of Aboriginal rights. The *Sparrow* test set out four broad questions, 1) Is there an existing Aboriginal right, 2) Has the right been extinguished; 3) Has there been a prima facie infringement of the right; 4) Can the infringement be justified.<sup>178</sup> The court has applied the same test of justification of a Treaty right through *Badger*. In *R v Cote*<sup>179</sup> the court held that the justification test applies, “with the same force and the same considerations to both species of constitutional rights.”<sup>180</sup>

Treaty rights, as sacred promises made between sovereign foreign nations, should not be infringed without the mutual consent of the signatories. Justified infringement and the widening scope of compelling reasons for justification, has the effect of overriding Treaty rights. Under the justification analysis, the court is only considering whether the Crown is infringing Treaty rights in the proper procedure or manner. It is not considering Treaty rights in accordance with their sacred and inviolable nature nor the principle of constitutional supremacy. The *Sparrow* justification test has limited use in respect of Treaty rights.<sup>181</sup>

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<sup>177</sup> B. Slattery, *supra* note 9 at 207.

<sup>178</sup> *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 at 27.

<sup>179</sup> *R v Cote* [1996] 3 SCR 139 [1996] CNLR 26 [*Cote*].

<sup>180</sup> *Ibid* at para 33.

<sup>181</sup> See also, Norman Zlotkin, “Interpretation of the Prairie Treaties”, at 190-191, in *Beyond the Nass Valley*, Lippert, O. (2000). *Beyond the Nass Valley: National implications of the Supreme Court's Delgamuukw decision*. Vancouver: Fraser Institute.

The third question in the *Sparrow* test asks whether there is a *prima facie* infringement of a treaty right. The court has also distinguished between ‘significant’ and ‘insignificant’ infringement. In *Cote*, the court held that the imposition of a fee for access did not infringe upon the Constitutional protected rights.<sup>182</sup> But the court in *Badger* found that a licensing system that regulated the method of hunting, such as the kind of game, season and area, infringed upon the Treaty right to hunt.<sup>183</sup> The court found the licensing system denied the holders of the Treaty right their preferred means of exercising those rights and was found to be in conflict with the treaty right.<sup>184</sup> The court also held that the constitutional entrenchment of Treaty rights prevented unilateral extinguishment and must be justified in accordance with *Sparrow*.

The court stated in *Cote* and *R v Nikal*<sup>185</sup> that insignificant interference with a Treaty rights will not trigger constitutional protection. The court rejected the idea that anything that affects or interferes with the exercise of those rights, no matter how insignificant, constitutes a *prima facie* infringement. In *Cote*, the court found that a small access fee for access to a controlled harvesting zone infringed upon the treaty right to fish but held the regulation, “imposed a modest financial burden on the exercise of the alleged treaty right”, creating only an insignificant interference and not a *prima facie* infringement.<sup>186</sup> Consequently, an infringement can place a modest burden on the treaty right’s holder and those rights can be infringed. Justification will only be required when infringement of the rights meets the court’s definition of *prima facie*. The court in *Sparrow* outlined what is a *prima facie* infringement, “First, is the limitation reasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right?”<sup>187</sup> The court must examine if there is a cumulative effect of a constitutionally valid legislative regime. The Treaty rights holder bears the onus on proving the infringement.<sup>188</sup> The *Sparrow* court

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<sup>182</sup> *Ibid* at para 50.

<sup>183</sup> *Badger*, *supra* note 9 at para 92.

<sup>184</sup> *Ibid* at para 94.

<sup>185</sup> *R v Nikal*, [1996] SCR 1013 [*Nikal*].

<sup>186</sup> *Cote*, *supra* note 179 at para 50.

<sup>187</sup> *Sparrow*, *supra* note 178 at 1112.

<sup>188</sup> *Gladstone v Canada, (Attorney General)*, [1996] 2 SCR 723, 4 CNLR at 52.

found a *prima facie* infringement if the regulation had an adverse restriction on the exercise of their right.<sup>189</sup> In effect, a *prima facie* infringement requires a ‘meaningful diminution’ of the right.<sup>190</sup>

In an Aboriginal rights context, the *Gladstone* court held that the questions about *prima facie* infringement are not determinative but are relevant to a *prima facie* infringement,

The *Sparrow* test for infringement might seem, at first glance, to be internally contradictory. On the one hand, the test states that the appellants need simply show that there has been a *prima facie* interference with their rights in order to demonstrate that those rights have been infringed, suggesting thereby that any meaningful diminution of the appellants' rights will constitute an infringement for the purpose of this analysis. On the other hand, the questions the test directs courts to answer in determining whether an infringement has taken place incorporate ideas such as unreasonableness and "undue" hardship, ideas which suggest that something more than meaningful diminution is required to demonstrate infringement. This internal contradiction is, however, more apparent than real. The questions asked by the Court in *Sparrow* do not define the concept of *prima facie* infringement; they only point to factors which will indicate that such an infringement has taken place. Simply because one of those questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement.<sup>191</sup>

The courts have outlined the justifications for legislative or regulatory infringements on Aboriginal and Treaty rights include safety, conservation and resource management where they are for a compelling and substantial purpose.<sup>192</sup> The *Gladstone* court expanded upon the range of objectives that can validly infringe on Aboriginal and Treaty rights,

Aboriginal rights are recognized and affirmed by Sec. 35(1) in order to reconcile the existence of distinctive aboriginal societies prior to the arrival of Europeans in North America with the assertion of Crown sovereignty over that territory; they are the means by which the critical and integral aspects of those societies are maintained.

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<sup>189</sup> *Sparrow*, *supra* note 178 at 70.

<sup>190</sup> *R v Morris*, [2006] 2 SCR 915, [2007] 1 CNLR 303 [*Morris*].

<sup>191</sup> *Gladstone*, *supra* note 188 at para 43.

<sup>192</sup> *Sparrow*, *supra* note 178 at 1113, and *R v NTC Smokehouse Ltd.*, [1996] 2 SCR 672 at para 97, [1996] 4 CNLR 130 [*Smokehouse*].

Because, however, distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.<sup>193</sup>

Included in the justifiable infringements are economic and regional fairness including non-aboriginal people's reliance on fisheries.<sup>194</sup> In *Delgamuukw*, the court outlined other valid objectives,

The general principles governing justification laid down in *Sparrow*, and embellished by *Gladstone*, operate with respect to infringements of aboriginal title. In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that "distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community" (at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.<sup>195</sup>

In effect, the court has held that a valid objective is one that is important enough to outweigh any Aboriginal or Treaty right.<sup>196</sup> That determination is made by the courts and yet again shows the tension the court has in protecting the overarching power of the Crown against the existence of Treaty rights. For Treaty nations, the common law Treaty rights paradigm requires them to prove their rights and the harm the proposed

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<sup>193</sup> *Gladstone*, *supra* note 188 at para 73.

<sup>194</sup> *Ibid* at 75.

<sup>195</sup> *Delgamuukw*, *supra* note 39 para 165.

<sup>196</sup> *R v McKenzie*, (2006) 281 Sask R 243, [2006] 4 CNLR 223 at para 48.

infringement will have on that right. Even if that is done, the menu of compelling and substantial reasons is so expansive that the protection offered by constitutional entrenchment is dubious.

Lisa Dufrainmont in "*From Regulation to Decolonization: Justifiable Infringement of Aboriginal Rights at the Supreme Court of Canada*" explains the paradox:

... broadening test for justification of infringement it informs, the discussion of reconciliation in *Gladstone* and *Delgamuukw* suggests that Aboriginal rights must give way when they conflict with public goals and interests. This idea of reconciliation is simply not a plausible articulation of the purpose of s. 35(1). Governments do not recognize and affirm minority rights for the benefit of the majority. Rather, the purpose of s. 35(1), as suggested in *Sparrow*, is remedial. Aboriginal rights have been constitutionalized precisely in order to promote a just settlement for Aboriginal peoples by strengthening and legitimizing their claims against the Crown.<sup>197</sup>

Gordon Christie's comments in "Aboriginality and Normativity, Judicial Justification of Recent Developments in Aboriginal Law" are particularly thought provoking and helpful:

What role, in particular, should the judiciary be playing in this matter? The way forward is clear enough, if unpalatable to the judiciary. A Section One-like approach to justifying legislative interference with Aboriginal rights should never have been contemplated. The judiciary simply cannot justify this change to the law as it applies to Aboriginal peoples and their rights. Appeals to the need for the application of the rule of law are empty, as are notions that the Court requires such an approach to operate appropriately in a balanced constitutional democracy. As unpleasant as the resulting situation may be, Aboriginal rights, at this point in the process of reconciliation, must be accorded the sort of legal protection they demand – that of 'sure and unavoidable' rights. These would be the sorts of rights which operate to protect essential Aboriginal interests – in living according to the good ways, knowledge of which has been handed down from generation to generation.<sup>198</sup>

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<sup>197</sup> Lisa Dufrainmont "From Regulation to Decolonization: Justifiable Infringement of Aboriginal Rights at the Supreme Court of Canada" (2000) 58 U.T. Faculty Law Review (QL) at para 24.

<sup>198</sup> Gordon Christie, "Aboriginality and Normativity, Judicial Justification of Recent Developments in Aboriginal Law" (2002) 17(2) CJLS 41 at 69-70.



The common law Treaty rights paradigm provides Constitutional protection from infringement by the Crown or its agents and requires justification of infringement. The common law Treaty rights paradigm also is a threat to those very rights by allowing a broad range of infringements to encroach upon them. In effect, the court ignored the ‘sacred and inviolable’ nature of Treaty rights. As Harold Cardinal in *The Unjust Society: The Tragedy of Canada’s Indians*, has stated,

To the Indians of Canada, the treaties represent an Indian Magna Carta. The Treaties are important to us, because we entered into these negotiations with faith, with hope for a better life with honour....  
.....The Treaties were the way in which the white people legitimizes in the eyes of the world, their presence in our country. It was an attempt to settle the terms of occupancy on a just basis, legally and morally to extinguish the legitimate claims of our people to title in our country ...<sup>199</sup>

Indeed, the paradox of protector and competitor is evident as the history and jurisprudence is unpacked. It is clear, however, that the protection offered by the courts has halted the unilateral extinguishment of Treaty rights and has required the Crown to justify any legislative limitation on the constitutionally protected rights. The court must apply the principles of Constitutional supremacy that is encrypted in both section 35(1) through the operation of section 52 of the *Constitution Act, 1982*.

## 2.6 CONCLUSION

Treaty First Nations entered into Treaty as independent sovereign nations who were under the protection of the Crown yet remained foreign jurisdictions. The Treaty agreements provided for the Treaty chiefs to exercise all the powers of peace and good order over the ceded territory and to protect the livelihood of the treaty people. It provided for limited administrative authority over Treaty First Nations and Treaty First Nations’ lands to the Crown and reserved all self-determination power for itself. Treaties created a distinct legal category under which Treaty First Nations peoples and Treaty First Nations’ lands were immune from the British Parliamentary legislation that was

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<sup>199</sup> Harold Cardinal, *The Unjust Society: The Tragedy of Canada’s Indians* (Edmonton: Hurtig, 1969) at 28-20.

inconsistent with the Treaty agreements. Pursuant to s. 132 of the *Constitution Act, 1867*, Canada is obligated to perform all Treaty obligations with the autonomous Treaty First Nations.

The inclusion of s. 35 in the *Constitution Act* provided an avenue for a new constitutional dialogue and consultation with the governments. Enshrining Treaty rights in the Constitution affirms the constitutional status and represents constitutional protection through constitutional supremacy. It provides a shield for rights holders against continued unilateral action by the Crown and limits the state's power. Treaty rights and the Treaty order are protected rights recognized by Imperial and Canadian constitutional law. Treaty rights cannot be extinguished<sup>200</sup> and the principles of interpretation requires the performance<sup>201</sup> and implementation in accordance with good government and Crown honour. The government of Canada has imputed knowledge of the existence of Treaty rights.<sup>202</sup> The words "recognized and affirmed" in s. 35(1) of the sacred Treaties confirmed an underlying *sui generis* constitutional obligation in Canada.<sup>203</sup> The obligation and wording of the treaties brought with it a constraint on the exercise of the Crown's sovereign power.<sup>204</sup> It incorporates the honour of the Crown and a fiduciary obligation on the Crown to the specific delegation of the treaties and the terms of the treaties are to be liberally construed with doubtful expressions resolved in favour of the Indians.<sup>205</sup> In the exercise of constitutional power, the Crown is mandated to be 'trust like' and 'non-adversarial.'<sup>206</sup> Treaties remain the foundation of Canadian Constitutional law and are therefore irrevocable. They have, after all, provided for a conditional consent to the peaceful settlement of European nations.

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<sup>200</sup> *Sioui*, *supra* note 29 at 1066.

<sup>201</sup> *Haida Nation*, *supra* note 3 at para 19.

<sup>202</sup> *Mikisew*, *supra* note 5 at 1.

<sup>203</sup> *Sparrow*, *supra* note 178 at para 62.

<sup>204</sup> *Ibid* at para 62.

<sup>205</sup> *Ibid* at para 56.

<sup>206</sup> *Ibid* at para 59.

**CHAPTER 3**  
**THE HONOUR OF THE CROWN PRECEPT REQUIRES TREATY**  
**IMPLEMENTATION**

*"...there can be no doubt that over the years the rights of the Indians  
were often honoured in the breach"*<sup>207</sup>

**3.0 INTRODUCTION**

The centuries old British doctrine and early judicial ruminations of the special relationship between Indigenous people and the Government of Canada has produced, and now resurrected, the doctrine of the honour of the Crown. Judicially created, the doctrine of the honour of the Crown is meant to represent conduct that reflects the highest honour, integrity and fair dealing by the Crown in right of Canada. It had manifested itself predominantly in treaty rights jurisprudence which included principles of interpretation, implementation, legal and procedural duties and has evolved to embrace rights that are asserted and not yet proven.<sup>208</sup> The honour of the Crown itself has been elevated to be a fundamental constitutional core concept that exists as a source of obligation independent of treaties.<sup>209</sup> It implicates government and its institutions in virtually every aspect of its dealings with Indigenous people. It has been used by the court as a proxy for the fiduciary duties owed to Indigenous people in the exercise of the legal duty to consult. In this context, in determining whether the Crown has fulfilled its legal duties, the court has held that the controlling question in Constitutional situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Indigenous peoples with respect to the interests at stake.<sup>210</sup>

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<sup>207</sup> *Ibid* at 1103, quoting McDonald J. in *Pasco v Canadian National Railway Co.*, [1985] BCJ No 2818, [1986] 1 CNLR 35 at 37 (BCSC), "We cannot recount with much pride the treatment accorded to the native people of this country."

<sup>208</sup> *Ibid*. The Supreme Court of Canada extended the legal duty to consult where Aboriginal title is asserted but not yet substantiated.

<sup>209</sup> *Haida*, *supra* note 3 at para 16.

<sup>210</sup> *Sparrow*, *supra* note 178 at para 43-45.

This chapter examines the Supreme Court of Canada's doctrine of the Honour of the Crown in the jurisprudence manifesting in the duty to consult. First, the origins of the doctrine are examined to understand its colonial foundation. Then its judicial evolution from a fiduciary obligation owed by the Crown to its current manifestation where the honour of the Crown is a surrogate where Indigenous claims are purported to be insufficiently specific to mandate a fiduciary standard on the Crown. The differences in the precepts has confused some courts and the term "honour of the Crown" has been thought of as imposing a moral and virtuous obligation on a Government who has anything but toward Indigenous Treaty People. Inherent difficulties arguably arise in calling upon the Crown's honour through its internal tension of self preservation in the face of competing Indigenous rights claims.

### **3.1 THE ORIGINS OF THE HONOUR OF THE CROWN DOCTRINE**

The concept of the honour of the Crown is derived from a centuries old British tradition of acting honourably for the sake of the sovereign. The concept dictated anyone acting on behalf of the king owed great personal responsibility to maintain the power and prestige of his king's name or fear dire consequences.<sup>211</sup> Eventually the separation of Sovereign and government became less identifiable and appealing to the honour of the Crown was an appeal, not just to the sovereign as a person, but also to a traditional bedrock of principles of fundamental justice that lay beyond persons and politics.<sup>212</sup> A notion arose of an unwritten figure of stateliness when action is undertaken in the name of the Crown.

The concept of the Crown's honour is the basis of the Treaty relationship. Indigenous people based the Treaty accords on the strength of the oral promises of the Treaty negotiator's words. The treaty negotiator's words were premised under the oath of

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<sup>211</sup> See D.M. Arnot, "The Honour of the Crown" (1996) 60 Sask L Rev 339. To cause embarrassment to the king would require the servant to answer with his life and fortune and could blemish the families name for generations.

<sup>212</sup> *Ibid* at 2.

the Queen's honour and the honour and integrity of the Commissioners who had the authority to act on her behalf. To bring further credibility of the honour of their words, the Treaty parties travelled with clergy and missionaries who swore the truth of the Commissioners' words. For example, during the Treaty 8 negotiations the Reverend Father Lacombe spoke of the honesty and honour of the Commissioners,

I consented to come here because I thought it was a good thing for you to take the Treaty. Were it not in your interest I would not take part in it. I have been long familiar with the Government's methods of making treaties with the Saulteaux of Manitoba, the Crees of Saskatchewan, and the Blackfeet, Bloods and Piegiens of the Plains, and advised these tribes to accept the offers of the Government. Therefore, to-day, *I urge you to accept the words of the Big Chief* who comes here in the name of the Queen. I have known him for many years, and, *I can assure you, he is just and sincere in all his statements*, besides being vested with authority to deal with you. Your forest and river life will not be changed by the Treaty, and you will have your annuities, as well, year by year, as long as the sun shines and the earth remains. Therefore I finish my speaking by saying, Accept!<sup>213</sup> (emphasis added)

Indigenous people held great reverence for the Queen as entering in a personal and kinship relationship through Treaty. The European nations were believed to be in an adopted family, akin to brothers, where they would be connected intimately to the Treaty First Nations into the future. Mutual respect and honour in the spoken word, promises exchanged and the responsibilities as family members was believed inherent in the relationship. It was regarded as special with the belief that the Crown also held the Treaty with the same reverence and in the best interest of the Indigenous people. The concept of the honour of the Crown, in its application to Indigenous people, evolved into Crown superiority and protector over Indigenous people and their interest. Initially, the Treaty

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<sup>213</sup> Charles Mair, *Through the Mackenzie Basin*, (Edmonton: University of Alberta Press, 1999) at 64 [originally published in 1908]. Author Charles Mair was the English secretary to the scrip commission that travelled with the Treaty Commission on the Treaty 8 expedition 1899, detailing the Reverend Father Lacombe's speech as he travelled with the Treaty Commissioners during Treaty 8 Negotiations. When the Reverend finished speaking, the chiefs and counsellors stood up, and requested all the Indians to do so also as a mark of acceptance of the Government's conditions. Father Lacombe was thanked by several for having come so far, though so very old, to visit them and speak to them, after which the meeting adjourned until the following day.

doctrines of familial terms of the father / child, guardian / ward language evolved into dominance as reflected in early British policy, statutes and jurisprudence.<sup>214</sup> Today, as in the past, the continued belief of the special relationship with the British Crown remains a beacon of hope for many Indigenous nations. Delegations of Chiefs and Indigenous people have long travelled to England, bearing declarations and letters of appeal for the Queen's intervention for just treatment by the Canadian Government.<sup>215</sup>

Judicial sentiments of the honour of the Crown doctrine in relation to the interpretation of Treaty rights found its beginnings in the dissent judgment from 1895 in *Re Indian Claims*.<sup>216</sup> Therein, Gwynne J. held that the British Sovereigns' pledged faith and honour when entering into treaties with the Indians, "the terms and conditions expressed in those instruments as to be performed by or on behalf of the Crown, have always been regarded as involving a trust graciously assumed by the Crown to the

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<sup>214</sup> See, for example: *The Royal Proclamation 1763*, "The several Nations or Tribes of Indians, with whom we are connected, and who live under our protection", *Sheldon v. Ramsay*, [1851] OJ No 82, 9 UCQB 105 (UCQB), held that the crown was acting in light of a parent in providing a grant to the Six Nations; *Calder v British Columbia (Attorney General)*, *supra* note 36 at 334, quoting a survey general memorandum, "The Indians have in fact been held to be the special wards of the Crown; Morris, "The Treaties of Canada" *supra* note 86 at 296, "They are wards of Canada, let us do our duty towards them".

<sup>215</sup> Net News Ledger, "Attawapiskat Chief Seeks Assistance of Queen Elizabeth II in Addressing Dire Circumstances," by James Murray on February 23, 2012.

<<http://netnewsledger.netnewsledgercom.netdna-cdn.com/wp-content/uploads/2011/12/royalChristmasmessage.jpg>>Attawapiskat First Nation has requested the assistance of Her Majesty, Queen Elizabeth II, in addressing the dire circumstances experienced by the First Nation and its members. In a letter to be delivered to the Queen through her representative, Governor General Johnston today, Chief Spence calls to Her Majesty's attention the actions of Crown officials in imposing third party management on the First Nation, in an apparently punitive response to the First Nation's request for assistance to deal with its housing crisis. The letter outlines the chronic underfunding experienced by the First Nation, the imposition of third party management, and the withholding of money for any government services by the third party manager. Chief Spence requests the Queen's assistance in encouraging Crown officials to act honourably by respecting the autonomy of the First Nation, and ensuring that the First Nation receive the support for infrastructure, government and administration that is available to all other Canadian communities, First Nations or otherwise.  
<<http://netnewsledger.com/2012/02/23/attawapiskat-chief-seeks-assistance-of-queen-elizabeth-ii-in-addressing-dire-circumstances>>

<sup>216</sup> *Province of Ontario v Dominion of Canada and Province of Quebec, Re Indian Claims* (1895), 25 SCR 434. *Guerin*, *supra* note at 411, Collier J. held "At the time and for many years before, according to the evidence, a great number of Indian Affairs personnel, *vis a vis* Indian band and Indians, took a paternalistic, albeit well-meaning, attitude; the Indians were children or wards, father knew best."

fulfillment of which with the Indians the faith and honour of the Crown is pledged and which trust has always been most faithfully fulfilled as a treaty obligation of the Crown ...” Later, in *R v Secretary of State*, Lord Denning found that the transfer of treaty obligations from the imperial crown to the crown in right of Canada, carried with it a duty to solemnly respect Treaty rights and obligations, “No Parliament should do anything to lessen the worth of these guarantees. They should be honoured by the Crown in respect of Canada, “so long as the sun shines and the river flows. That promise should never be broken.”<sup>217</sup>

The sentiment that treaty rights obligations were considered to be legally binding on the Crown<sup>218</sup> remained. The court held that at the time of the signing of the treaty, the British Crown assumed a ‘trust’ of faith and honour to fulfill the terms of the treaty negotiated and held.<sup>219</sup> In the *Robinson Treaties Annuities*<sup>220</sup> case, Gwynne J., stated,

What is contended for and must not be lost sight of, the that the British sovereigns, ever since the acquisition of Canada, have been pleased to adopt the rule or practice of entering into agreements with the Indians Nations or tribes in their province of Canada, for the cession or surrender by them of what such sovereigns have been pleased to designate that Indian title, by instruments similar to these now under consideration to which they have been pleased to give the designation of treaties’ with the Indian’s in possession of and claiming title to the lands expressed in those instruments as to be performed by or on behalf of the Crown, have always been regarded as involving a trust graciously assumed by the Crown to the fulfilment of which with the Indians the faith and honour of the Crown is pledged, and which trust has always been most faithfully fulfilled as a treaty obligation of the Crown.<sup>221</sup>

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<sup>217</sup> *Secretary of State*, *supra* note 122 at 99.

<sup>218</sup> *Taylor and Williams*, *supra* note 166.

<sup>219</sup> *Marshall*, *supra* note 9 at para 50, on Gwynne J’s dissent in *Canada (Attorney General) v Ontario (Attorney General)*, (1895) 25 SCR 434 (SCC) (dissenting) at 511-12, affirmed (1896), 1896 Carswell Nat 44 (Canada PC); *Seybold* (1901) 32 SCR 1 (SCC) at 2 affirmed (1902) [1903] AC 73 (Ontario PC),

<sup>220</sup> *Canada (AG) v Ontario (AG)* (1897) AC 199 (PC) [*Robinson Treaties Annuities*], *ibid* at 511.

<sup>221</sup> *Ibid*. At issue was whether a promise made in Treaty to pay increased annuities was within s. 109 of the *Constitution Act, 1867*, which vested lands to the provinces “subject to any Trusts existing in respect thereof and to any Interest other than that of the Province in the same.” Both the Supreme Court of Canada and the Privy Council held that it did not. [1897] AC 199 (UKPC).

Unfortunately, this principle of trust, faith and honour of the Crown has not been consistently applied through subsequent years by the judiciary. In the appeal of *Re Indian Claims*, Lord Watson, for the majority found that the honour of the Crown is not incorporated in Treaty promises when he commented, “Their Lordships have had no difficulty in coming to the conclusion that under the treaties the Indians obtained no right to their annuities...beyond a promise and agreement which was nothing more than a personal obligation by its governor.”<sup>222</sup>

This approach continued in *St. Catherine’s Milling and Lumber Co. v R.*, where the Privy Council held that Aboriginal people’s interest in their lands was a “personal and usufructary right, dependent upon the good will of the Sovereign.”<sup>223</sup> In the same case before the Supreme Court of Canada, Justice Tashereau stated, “The Indians must in the future ... be treated with the same consideration for their claims and demands that they have received in the past, but, as in the past, it will not be because of any legal obligation to do so, but as a sacred political obligation, in the execution of which the state must be free from judicial control.”<sup>224</sup> This perception of treaty obligations being merely political obligations was cited with approval in both *R v Wesley*<sup>225</sup> and *R v Sikyea*.<sup>226</sup>

The Crown’s practice remained similar<sup>227</sup> until 1966 *R v George*<sup>228</sup> where the dissent held the honour of the Crown dictated the manner in which the Treaty and Acts of

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<sup>222</sup> *Re Indian Claims*, *supra* note 9 at 213.

<sup>223</sup> *St. Catherine’s Milling* *supra* note 36.

<sup>224</sup> *Ibid* at 649.

<sup>225</sup> *Wesley*, *supra*, note 159 at 788, “In Canada the Indian treaties appear to have been judicially interpreted as being mere promises and agreements.”

<sup>226</sup> *Sikyea*, *supra* note 156 at 154, “While this case (*Re Indian Claims*) refers only to the annuities payable under treaties, it is difficult to see that the other covenants in the treaties, including the one we are here concerned with, can stand on any higher footing.” See also Leonard I. Rotman, “*My Hovercraft is full of Eels: Smoking out the message in R v Marshall*” (2000) 63 Sask L Rev at 617-644.

<sup>227</sup> *Ontario Mining Co v Seybold*, [1901] SCJ No 63, 32 SCR 1 at 3 (SCC), Gwynne Dissenting, Upon surrender the Indian Title consists in the honour of the Sovereign being pledged to a faithful observance of the conditions upon the faith of which the Sovereign procured each surrender to be made; *Treaty No 3 Annuities*, [1909] SCJ No 28, 42 SCR 1 at 103-104 Idington J., A line of policy begotten of prudence, humanity and justice adopted by the British Crown to be observed in all future dealings with the Indians in respect of such rights as they might suppose themselves to possess was outlined in the Royal Proclamation of 1763 erecting, after the Treaty



Parliament should be interpreted. In 1981, the Ontario Court of Appeal, in *Taylor and Williams*, Mackinnon J, referenced the dissent in *George*, and invoked the honour of the Crown as an integral part of determination, by stating, “The principles to be applied to the interpretation of Indian treaties have been much canvassed over the years. In approaching the terms of a treaty quite apart from other considerations already noted, the honour of the Crown is always involved and no appearance of ‘sharp dealing’ should be sanctioned.”<sup>229</sup>

As a colonial doctrine, the honour of the Crown represented the British Crown's commitment and honour in the Treaty negotiations and promises made. Judicially, the doctrine of the honour of the Crown became imposed on the government as the Treaty obligations failed to be honoured. The court began to re-establish the principle of Crown honour on the Crown and reincorporated it as a positive duty. At the same time however, the tenets of Crown honour were not upheld uniformly. The judiciary had, for many years, completely ignored the honour of the Crown doctrine, thereby making it convenient for the Crown to also ignore.

### **3.2 THE JUDICIAL EVOLUTION OF THE CROWN'S FIDUCIARY DUTY TO INDIGENOUS PEOPLE TO THE HONOUR OF THE CROWN PRECEPT**

According to *Black's Law Dictionary*,<sup>230</sup> a fiduciary is derived from the Roman law, and means a person holding the character of a trustee, or a character analogous to

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of Paris in that year, amongst others, a separate government for Quebec, ceded by that treaty to the British Crown. That policy adhered to thenceforward, by those responsible for the honour of the Crown led to many treaties whereby Indians agreed to surrender such rights as they were supposed to have in areas respectively specified in such treaties.

<sup>228</sup> *R v George*, *supra* note 157, Cartwright J in dissent stated, “We should endeavour to construe the treaty of 1827 and those Acts of Parliament which bear upon the question before us [*ie* whether the treaty right to hunt had been destroyed by statute] in such manner that the honour of the Sovereign may be upheld and Parliament not made subject to the reproach of having taken away by unilateral action and without consideration the right solemnly assured to the Indians and their posterity by treaty.”

<sup>229</sup> *Taylor and Williams*, *supra* note 166 at 367.

<sup>230</sup> <<http://blackslawdictionary.org/fiduciary/>>

that of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires. In essence, a fiduciary duty in private law imposes a legal duty on a fiduciary whereupon the fiduciary undertakes to act on behalf of a beneficiary. The doctrine of the honour of the Crown and the Crown's fiduciary duties have the same tenets of trust, honour, integrity and to act in the best interest of their beneficiary.<sup>231</sup> However, the fiduciary relationship is just one aspect of the relationship between the Crown and Indigenous people. The honour of the Crown and the fiduciary relationship has evolved to be treated independently by the courts.<sup>232</sup> In the earlier jurisprudence, Treaty cases most often did not refer to the fiduciary duty and the honour of the Crown is not often highlighted in fiduciary jurisprudence. Fiduciary duties between the Crown and Indigenous people have a history in the jurisprudence and has been infused and confused with the honour of the Crown precept. Eventually the two doctrines were separated as arguably looser standard of legal obligation was imposed on the Crown when it could not be said it was acting for a specific Constitutional or statutory interest of the Indigenous people. The fiduciary obligation shifted from the Crown's obligation of the highest standard of strict deference of Indigenous interests to an obligation of acting with honour.

The evolution of the fiduciary doctrine toward the honour of the Crown precept began with the recognition of Crown duties as being a clear fiduciary duty towards the Musqueam people in *Guerin*.<sup>233</sup> Specifically, the Crown was held to a strict fiduciary standard and duty when dealing with the interests of Indigenous land to which it asserted underlying ownership. In *Guerin*, the court was reluctant to find a trust created by the Crown to the Musqueam, which would have occurred had the Musqueam actually enjoyed independent interest in their own lands.<sup>234</sup> The Constitutional fiduciary doctrine was based on *sui generis* nature of Indian title and the historic powers and responsibilities

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<sup>231</sup> For example in *Sparrow*, *supra* note 178 at para 76-80, where the government was required by the court to make Aboriginal fishing for food a priority in the resource allocation.

<sup>232</sup> Leonard I. Rotman, "Aboriginal Rights: Crown-Native Relations as Fiduciary: Reflections almost 20 years after *Guerin*", (2003) 22 Windsor YB Access Just. 363 at 16-18.

<sup>233</sup> *Guerin*, *supra* note 2.

<sup>234</sup> Gordon Christie, "A Colonial Reading of Recent Jurisprudence: *Sparrow*, *Delgamuukw* and *Haida Nation*" (2005) 23 Windsor YB Access Just 17, at 14. [Christie, "A Colonial Reading"]

assumed by the Crown<sup>235</sup>. The court distinguished the special obligation by the Crown from a political,<sup>236</sup> constructive or private law concept of trust.<sup>237</sup> The lack of recognition of Indigenous rights to their land and the Crown's assertion of underlying title create lawful obligations in the common law but breach the Indigenous orders from which the rightful interest originates. The court indicated that the nature of the Indian interest in land and the fiduciary obligation is the same regarding proven or asserted title.<sup>238</sup> Aboriginal land title, regarded as only alienable by purchase by the Crown, constitutes the source of the fiduciary duty and places an equitable obligation on the Crown.<sup>239</sup> Similar principles apply to the ceded lands in Treaties.<sup>240</sup>

The court then recognized a fiduciary duty owed by the Crown under s. 35 of the *Constitution Act*, when justifying infringements of Indigenous rights under *Sparrow*, when it held, "the honour of the Crown is at stake in dealings with the Aboriginal people."<sup>241</sup> The *Sparrow* court linked its decisions with the fiduciary duty in *Guerin*,<sup>242</sup> the honour of the Crown in *Taylor and Williams*<sup>243</sup> and treaty interpretation in *Nowegijick*

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<sup>235</sup> *Guerin*, *supra* note 2 at para 59.

<sup>236</sup> James (Sa'ke'j) Youngblood Henderson, "Animating the Honour of the Crown", Draft document, Unpublished and provided as part of course readings in Law 898. Term 2 2005/06 at 19, stated, "The political trust cases concerned essentially the distribution of public funds or other property held by the government. These false ideas of political trust were fabricated by Canada in a similar representation to the prohibited process of the local legislature as described in the 1837 Select Committee report Transfer of the fiduciary powers to Canada in s.91(24) did not resolve the problems of the trust or fiduciary administration in representative legislatures. In each case the party claiming to be beneficiary under such a trust depended entirely on statute, ordinance or treaty as a basis for a claim in its interest in the funds in question. Since Aboriginal title is an independent legal regime, the political trust decisions of public law duty are inapplicable."

<sup>237</sup> *Guerin*, *supra* note 2 at 379, the court held that while it is not private law duty in the strict sense either, [the sui generis duty] is nonetheless in the nature of a private law duty.

<sup>238</sup> *Ibid* at 379, "it did not matter that the case was concerned with the interest of an Indian Band in a reserve rather than with unrecognized Aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases," the court was relying on *AG Que. v AG Can.*, [1921] 1 AC 401 at 410-411 PC.

<sup>239</sup> *Ibid* at 287.

<sup>240</sup> Henderson, "Animating the Honour of the Crown", *supra* note 236 at para 24. "Similar principles apply to Treaty rights that surrender Aboriginal tenure to the Crown creating "Treaty Tenure"."

<sup>241</sup> *Sparrow*, *supra* note 178 at para 62, 1114.

<sup>242</sup> *Guerin*, *supra* note 2.

<sup>243</sup> *Taylor and Williams*, *supra* note 166.

*v The Queen*,<sup>244</sup> in confirming that the honour of the Crown is invoked in Treaty interpretation by holding, "... ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a *fiduciary capacity* with respect to Aboriginal peoples. The relationship between the Government and Aboriginals is trust like, rather than adversarial, and contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historic relationship."<sup>245</sup> (emphasis added). The history of the Treaties and the historic obligations of the Crown creates the special trust relationship based on the treaty principles.<sup>246</sup> The *Sparrow* court's concept of honour does not match the Indigenous Treaty principles of sacred inviolability. It became apparent that constitutional recognition of existing Aboriginal rights did not mean they were immune from infringement. Instead of requiring explicit extinguishment, the court opened the door to implicit abrogation through the justification test. The court had failed to comprehend that infringing and violating Treaty rights breaks the original compact and the consensual foundation of vested constitutional obligations upon which Canada is constructed. It violates both imperial and Constitutional promises, the honour of the Crown and constitutional fiduciary duties.<sup>247</sup> Unilateral Crown infringements on Treaty rights are unconstitutional and not justifiable.

In finding a fiduciary duty was owed by the Crown in respect of Indigenous lands and Treaty rights, the honour of the Crown doctrine remained a precept and part of the fiduciary doctrine. The court *Van der Peet* articulated both the fiduciary duty and the honour of the Crown as synonymous by stating,

The Crown has a *fiduciary obligation* to Aboriginal peoples with the result that in dealings between the government and Aboriginals *the honour of the Crown* is at stake. Because of this *fiduciary relationship*, and its implication of the honour of the Crown, treaties, s. 35(1), and other statutory provisions protecting the interests

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<sup>244</sup> *Nowegijick v The Queen* [1983] SCJ No 5 [1983] 1 SCR 29 (SCC)[*Nowegijick*].

<sup>245</sup> *Guerin, Taylor and Williams*, supra note 166, *Nowegijick*, *Ibid*.

<sup>246</sup> *Sparrow*, supra note 178 at para 59, "In our opinion, *Guerin*, together with *Taylor and Williams*, ground a general guiding principle for s. 35(1). That is, the government has the responsibility to act in a fiduciary capacity with respect to Aboriginal peoples. The relationship between the Government and Aboriginals is trust like, rather than adversarial and contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historical relationship."

<sup>247</sup> Henderson, "*Animating the Honour of the Crown*" supra note 236 at 6.

of Aboriginal peoples, must be given a generous and liberal interpretation ... this general principle must inform the Court's analysis of the purposes underlying s. 35(1), and of that provision's definition and scope.<sup>248</sup> (emphasis added).

The Supreme Court in remaining faithful to a holding the Crown to the highest standard of obligation, regardless of the doctrine label, stayed, at the very least, cognizable to the original understanding of Treaty First Nation people.

Outside of the Constitutional obligations of the Crown, the Supreme Court began narrowing of the fiduciary doctrine by rearticulating the perimeters of the fiduciary doctrine of one where a fiduciary duty arises when unilateral power and discretion is exercised over another. In *Blueberry River Indian Band v Canada*,<sup>249</sup> the minority court provided an explanation for the basis of a fiduciary relationship in private law when it held,

Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second “peculiarly vulnerable” person: The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (or more often finds himself in the situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power trusts the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.

For Indigenous people, the exercise of unilateral power of governmental departments can be argued to have been consistently applied to their rights and lands.

It was not until 2002 that the Supreme Court in *Wewaykum Indian Band v Canada*,<sup>250</sup> drew a clear distinction between Constitutional obligations and statutory duties under the *Indian Act* and noted that since its decision in *Guerin*, that the courts have been flooded with fiduciary claims by Indian bands across a whole spectrum of

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<sup>248</sup> *R v Van der Peet*, *supra* note 47 at para 24.

<sup>249</sup> *Blueberry River Indian Band v Canada*, 1995 CanLII 50 (SCC), [1995] 4 SCR 344 at para 38. [Blueberry], citing *Frame v Smith*, 1987 CanLII 74 (SCC), [1987] 2 SCR 99; *Norberg v Wynrib*, 1992 CanLII 65 (SCC), [1992] 2 SCR 226; and *Hodgkinson v Simms*, 1994 CanLII 70 (SCC), [1994] 3 SCR 377.

<sup>250</sup> *Wewaykum Indian Band v Canada*, 2002 SCC 79 (CanLII), [2002] 4 SCR 245, 2002 SCC 79 [Wewaykum].

complaints.<sup>251</sup> The court made the separation from an “at large” fiduciary duty owed by the Crown to a restrictive fiduciary relationship, “... not all obligations existing between parties to a fiduciary relationship are themselves fiduciary in nature ... and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown has assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.”<sup>252</sup> The court went on to state, “But there are limits. The appellants seemed at times to invoke the fiduciary duty as source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.”<sup>253</sup> In effect, the court began to relieve the Crown of its liability and a strict standard of duty as fiduciary as it was inundated with claims of complaints of Crown statutory or regulatory conduct. The shift represents another turning point in the Aboriginal rights doctrine where the court is offering a narrow interpretation of statutory law and the protection offered therein. The tightening of the fiduciary doctrine begins the process of placing an obligation on a Crown to act honourably toward competing Indigenous rights when, inherently, it shows allegiance only to itself.

Then in *Haida*, two years later, the Supreme Court returned to the Constitutional doctrine of the honour of the Crown by reiterating the fiduciary principles in *Wewaykum* and elevating and making explicit the doctrine of the honour of the Crown in the duty of consultation. The honour of the Crown is now deemed as being a broad duty, which may, in some cases, invoke a fiduciary duty, but stands independently. The *Haida* court held,

The government’s duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples. It is not a mere

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<sup>251</sup> *Ibid* at para 82.

<sup>252</sup> *Ibid*.

<sup>253</sup> *Ibid* at para 81.

incantation, but rather a core precept that finds its application in concrete practices.<sup>254</sup>

The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty. The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfillment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interests at stake. As explained in *Wewaykum*, the term "fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples: ... "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship ... overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.<sup>255</sup>

Specifically the court has held that Aboriginal rights that are in the pre-proof stage, where Aboriginal rights and title have not yet been proven in court, the "Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title"<sup>256</sup> As stated in Chapter 2, the characterization of un-proven rights provides less protection than a stricter standard under a fiduciary doctrine. The fatal error in this reasoning is that rights that are deemed 'pre-proof' are rights that exist, are known and confirmed in Indigenous nations and their legal orders.

Then in respect of Treaty rights in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*,<sup>257</sup> the court held that the taking up clause in Treaty 8

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<sup>254</sup> *Haida*, *supra* note 3 at 16.

<sup>255</sup> *Ibid* at para 16, 18, citing *Badger*, *supra* note 9 at para 41; *Wewaykum*, *supra* note 250 at para 79.

<sup>256</sup> *Ibid* at para 18.

<sup>257</sup> *Mikisew* *supra* note 5

contemplated that portions of the surrendered land would be taken up from time to time for settlement, mining, lumbering, trading or other purposes<sup>258</sup> and that “the Crown was and is expected to manage the change honourably.”<sup>259</sup> The court made clear that the honour of the Crown operates independent of a fiduciary duty by holding the duty to consult is grounded in the honour of the Crown, and it is not necessary for present purposes to invoke fiduciary duties,

The honour of the Crown is itself a fundamental concept governing treaty interpretation and application that was referred to by Gwynne J. of this court as a treaty obligation as far back as 1895, four years before Treaty 8 was concluded: *Province of Ontario v Dominion of Canada*, (1895) 25 SCR 434 at pp.511-12 per Gwynne (dissenting). While he was in the minority in his view that the treaty obligation to pay Indian annuities imposed a trust on provincial lands, nothing was said by the majority in that case to doubt that the honour of the Crown was pledged to the fulfillment of its obligations to the Indians. This had been the Crown’s policy as far back as the *Royal Proclamation* of 1763, and is manifest in the promises recorded in the report of the Commissioners. The honour of the Crown exists as a source of obligation independently of treaties as well, of course. In *Sparrow*, *Delgamuukw*, *Haida* and *Taku River*, the “honour of the Crown” was invoked as a central principle in resolving Aboriginal claims to consultation despite the absence of any treaty.<sup>260</sup>

The honour of the Crown remained a core precept in the implementation of Treaty rights claims as a 'central principle.' The Federal Court in *Dene Tha' First Nation v Canada (Minister of Environment)*, again solidified the relationship of the doctrines by holding that where Indigenous people have no protection, the honour of the Crown fills in to ensure Crown conduct is in accordance with its Constitutional duty: "The major difference between the fiduciary duty and the honor of the Crown is that ... the latter can be triggered even where the Aboriginal interest is insufficiently specific to require that the Crown act in the Aboriginal group's best interest (that is, as a fiduciary). In sum, where an Aboriginal group has no fiduciary protection, the honour of the Crown fills in

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<sup>258</sup> *Ibid* at para 30.

<sup>259</sup> *Ibid* at para 31.

<sup>260</sup> *Ibid* at para 51.



to insure the Crown fulfills the Section 35 goal of reconciliation of "the pre-existence of Aboriginal societies with the sovereignty of the Crown."<sup>261</sup>

Some lower courts have been confused about the differentiation in the fiduciary duty and the honour of the Crown, the British Columbia Supreme Court in *Hereditary Chiefs Tony Hunt et al v Attorney General of Canada et al* held, "I think it must be recognized that just as Aboriginal rights are *sui generis*, Aboriginal rights litigation is also unique. It involves hundreds of years of history and sometimes unconventional techniques of fact finding. It involves lofty, often elusive concepts of law such as the *fiduciary duty* and *honour of the Crown*."<sup>262</sup> As well, the Ontario Superior Court in *Platinex* held, "...because the Crown's duty to consult engages the honour of the Crown and flows *from* its fiduciary relationship with First Nations peoples."<sup>263</sup> In addition to the confusion between the two doctrines, legal commentators have been unclear about the legitimacy of the honour of the Crown, terming it a indefinable abstract notion stated in mystical terms.<sup>264</sup>

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<sup>261</sup> *Dene Tha' First Nation v Canada (Minister of Environment)*, [2006] FCJ No 1677, [2007] 1 CNLR 1 at para 81 [*Dene Tha'*].

<sup>262</sup> *Hereditary Chiefs Tony Hunt et al v Attorney General Canada et al*, 2006 BCSC 1368 at para 26 [*Hereditary Chiefs*]. J. Satanove, continued by "We cannot simply view aboriginal claims in the same light as other civil litigation. I believe effective case management of Aboriginal litigation requires an effort on behalf of all parties and the court to find a creative way to try the issues without invoking oppressive conduct that deters the plaintiffs or prejudices the defendants." The conflict between the Kwakiult Hereditary Chiefs (plaintiffs) and the Federal and the Provincial Government of British Columbia over the right to fish is, according to court, notorious and has continued for many years. The Kwakiult Nation claim that a clause in the 1851 treaty between the Hudson Bay Company and the Fort Rupert Indian Tribes, the Douglas Treaty, granted them exclusive fishing rights in these areas.

<sup>263</sup> *Platinex Inc. v Kitchenuhmaykoosib Inninuwug First Nation*, [2007] 3 CNLR 181 (ON SCJ) at para 85.

<sup>264</sup> *Stoney Band v Canada*, 2004 FC 122 [2004] 4 CNLR 348; 245 FTR 288 at para 33[*Stoney*], noting a case comment on *R v Marshall*<sup>1</sup>, where W. H. Hurlburt, LL.D. (Hon.) Q.C., of the Alberta Bar, wrote at para 26, "The actual effect of what the Supreme Court of Canada has done with the notion of the "honour of the Crown" is to hold that the Crown stood in a confidential relationship with aboriginal groups and that the confidentiality of the relationship imposed on the Crown a duty to adhere to standards of conduct higher than those which are imposed by ordinary commercial morality. It would, in my submission, be better to put it that way. A relational analysis can yield the desired result (the imposition of a higher standard of conduct on the Crown) without giving as the source of the higher duty an indefinable abstract notion stated in almost

The court's jurisprudential evolution of the constitutional and statutory fiduciary doctrine to the doctrine of the honour of the Crown reflects the court's difficulty in constructing the common law to fit the Constitutional agenda on Indigenous peoples. Specifically, the application of the Crown's fiduciary duty is a consequence of the Crown assuming unilateral control and underlying title over all Indigenous lands without moral and legal legitimacy. The Crown also claims the discretion in deciding which Indigenous rights it will afford legal recognition and protection to in the common law in the absence of Indigenous legal orders. The recognition of rights by the Crown and courts is directly proportional to the protection the right will be afforded and the Crown's corresponding duty. The constitutional status of Indigenous rights appears to have little consequence when not yet recognized by the common law. The court through the jurisprudence has successfully separated the Crown from stronger and more enforceable legal duty by narrowing the scope of Crown liability. The internal conflict between the Crown's duty to protect itself and its duty to act honourably in the face of Indigenous claims against itself causes the dichotomies in the law, which the court is complicit in perpetuating. A cogent example is in the Federal Court of Appeal case in *Canada v Stoney Band*, a complaint by the Stoney people against the Crown for a breach of fiduciary duty in a land surrender. The court held that in litigation, the Crown owes no fiduciary duty to its adversary, Indigenous people.<sup>265</sup>

The Crown claims ownership over all Indigenous lands and has placed themselves and their institutions as the gatekeeper of ancient Indigenous rights, including where and when they can be exercised. The question must be asked, how can the Crown be said not

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mystical terms. It would be better to state the proposition directly than to explain it by bringing in a concept of "the honour of the Crown".

<sup>265</sup> *Canada v Stoney Band*, 2005 FCA 15, 249 DLR (4th) 274, [2005] 2 CNLR 371 at para 22, held, in litigation, the Crown does not exercise discretionary control over its Aboriginal adversary. It is therefore difficult to identify a fiduciary duty owed by the Crown to its adversary in the conduct of litigation. It is true that an aspect of the claim against the Crown by the Stoney Band is based on an allegation of breach of fiduciary duty with respect to the surrender and disposition of reserve land. But even if such a fiduciary duty existed, that duty does not connote a trust relationship between the Crown and the Stoney Band in the conduct of litigation.

to be acting in a trust-like responsibility in its dealings with Indigenous people? The Crown has created a number of dichotomies in the colonial assertion of sovereignty over Indigenous peoples by cloaking itself as having the control and responsibility over Indigenous interests. As such, Indigenous Treaty people assert that the Crown should be held to the highest standards of trust and protection of the Indigenous people interests they purport to control.

Brian Slattery, in "Aboriginal Rights and the Honour of the Crown" advances three theories on how the honour of the Crown doctrine has arose; 1. That the Crown voluntarily assumed this duty when it asserted sovereignty over the Indigenous peoples of Canada, as evidenced by the *Royal Proclamation*; 2. The duty is a pre-existing legal duty or responsibility governed by the Crown's assertion of sovereignty over Indigenous peoples and required the Crown to deal honourably with these peoples and respect their basic rights; and 3. The duty to act honourably stems from the explicit rights recognition and affirmation of Aboriginal rights in s. 35 of the *Constitution Act, 1982*.<sup>266</sup> Slattery notes that court rejected the third theory and through *Haida*, has positioned the honour of the Crown as a general principle in law at the time of asserted sovereignty:

This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people. As stated in *Mitchell*, "with this assertion [of sovereignty] arose an obligation to treat Aboriginal peoples fairly and honourably, and to protect them from exploitation".<sup>267</sup>

The Treaty nations shared, without purchase, their lands and this mandates the Crown's fiduciary duty to the Treaty nations. The Crown's unilateral assertion of sovereignty and assumption of control over Indigenous interests mandates the Crown to honourable conduct. Indigenous Treaty people also envision a fourth theory, that of the Crown, as a

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<sup>266</sup> Brian Slattery, *supra* note 175 at 443-444.

<sup>267</sup> *Haida*, *supra* note 3 at para 32.

partner in the Treaty, in a remedial duty that encapsulates both trust, fiduciary principles and honour of the Crown tenets until there is a return to the equal partnership envisioned in Treaty. The court in *Haida, Taku* and *Mikisew* has begun that process of demanding the Crown move toward a course of Indigenous rights recognition and mandates inclusion of the rights holders but it does not go far enough. A new Constitutional order is required, inclusive of Indigenous legal and Constitutional orders.

It is important to note that the *Haida* court has indicated that the court can no longer sustain the assertion of unilateral Crown sovereignty and the special relationship between the Crown and Indigenous peoples mandates the Crown to act honourably in negotiating their rights,

Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown, requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.<sup>268</sup>

The court is infusing a Constitutional duty of honourable conduct in the ongoing negotiation process of Constitutional rights recognition. The duty of consultation is one part of the honour of the Crown; it determines the scope of the duty and corresponding Crown honour. Canada is still very much in the grips of colonialism, and has not reached a point where it can be said to be a post-colonial state. Can a standard of honourable conduct of the Canadian government be capable of extricating itself from its foundational values?

Within the honour of the Crown there are priorities and competing interests that conflict with the judicially created definition of Crown honour. The Crown has certain values and goals that are internal core 'laws' within itself. Two opposite and competing

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<sup>268</sup> *Ibid* at para 25.

goals collide when the honour of the Crown protects and defends itself against competing claims of Indigenous interests such as claims to underlying title. The Crown's own self interest will have priority over competing Indigenous claims. As such, the Crown will work naturally to preserve itself and its interests as a matter of survival and allegiance to itself. Its a trap of double speak to demand Crown honour. The present and historical injustices between the Crown and Indigenous people provide the salient example of Crown honour in operation.

### **3.3 THE HONOUR OF THE CROWN AND THE TREATY ORDER**

The jurisprudence on the honour of the Crown and Indigenous treaty rights needs to embody the highest standard and protection possible to give content to the promises guaranteed to the Indigenous rights holders by the Crown. The treaties are Constitutional, sacred and inviolable covenants. They were signed so that the Treaty nations could retain their inherent sovereignty, their legal orders and their livelihood as Indigenous people forever. The Canadian government and the Canadian courts have used a number of theoretical arguments to undermine Treaty orders and sovereignty and to repudiate the spirit and intent of the Treaties. The breaches of Treaty obligations by the Crown began immediately by failing to implement the written terms of Treaty through the exclusion of the oral promises in the negotiation and consultations, creating a threat to proper interpretation of the agreements on which Canada has been founded. The Crown's pledge of honour failed to include the performance and implementation of Treaty. Even those promises expressly included in the written texts have been abrogated and narrowly construed. The basic and fundamental Indigenous right to hunt and fish as been increasingly restricted through legislation; clauses such as the medicine chest have been narrowly interpreted resulting in woefully inadequate treatment for Treaty beneficiaries; and promised education and housing provision has not been fully implemented leaving Indigenous treaty holders situated far below standards of other Canadians.

As treaty is an exchange of solemn promises between the Crown and Indigenous people, all of the treaty terms bind and govern the rights and responsibilities of the parties. Treaties are agreements between sovereigns; they supersede Canadian domestic laws, customs and conventions within which the Canadian government exercises its powers. Indigenous sovereignty is equal to the Crown's asserted sovereignty. As a branch of the Crown, the courts are expected to be impartial, independent and be capable of extricating itself of bias and prejudice that originates in the English language and the Eurocentric world view from which they originate. The Indigenous sovereigns expected the courts to be the guardians of Treaty and not allow Parliament to divest itself of its Treaty obligations to the Indigenous Treaty rights holders. Full compliance with the Treaties invokes the honour of the Crown; no government could act honourably and decline to uphold the Crown's solemn promises.<sup>269</sup>

The honour of the Crown involves a Constitutional duty to interpret and protect Treaty Rights. It provides positive rights on the Crown in Canadian federalism to respect the sovereignty of Indigenous Treaty nations and to consider always the treaty guarantee of collective survival, the enrichment of life and the future survival of the Treaty nations.<sup>270</sup> The Indigenous Treaty nations were guaranteed a continuation of their way of life, this above all was a central concern, that they would be able to maintain their livelihood as autonomous people. Any federal law or policy that fails or failed to implement the treaties and reduced treaty nations to poverty or marginalization is and must be viewed as a breach of the honour of the Crown.<sup>271</sup>

As stated throughout this thesis, Indigenous Nations had preexisting sovereignty that has been affirmed through the Treaties and Imperial law which protects their continued existence. Constitutional law together with Treaty rights informs the doctrine of the honour of the Crown.<sup>272</sup> Treaties are legally binding<sup>273</sup> and the Crown's honour

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<sup>269</sup> Henderson, "*Animating the Honour of the Crown*", *supra* note 236 at 9.

<sup>270</sup> *Ibid* at 14.

<sup>271</sup> *Ibid* Mikisew *supra* note 5 at para 47-50.

<sup>272</sup> *Ibid* at 4.

requires the judiciary to assume that the Crown intended to fulfill its promises.<sup>274</sup> The court has stated that the honour of the Crown is always involved in its dealings with aboriginal people, from the assertion of sovereignty to the resolution of claim and treaty making and treaty interpretation.<sup>275</sup>

The honour of the Crown is bound by a set of principles of treaty interpretation and the Courts are required to interpret the treaties in a manner that maintains the honour of the Crown.<sup>276</sup> Treaties constitute a unique type of agreement and attract special principles of interpretation.<sup>277</sup> Treaties should be given a large liberal construction and any ambiguities or doubtful expressions should be resolved in favour of the Indians.<sup>278</sup> The words of the treaty must be construed in the sense which they would naturally have been understood by the parties at the time and technical or contractual interpretation should be avoided.<sup>279</sup> The common law goal of treaty interpretation is to choose amongst the common intentions of the parties that best reconciles the interests and in doing so, the integrity and honour of the Crown is presumed.<sup>280</sup> The honour of the Crown demands that the treaty terms be interpreted in a flexible way that is sensitive to the evolution of changes in normal practice.<sup>281</sup> No appearance of sharp dealing will be tolerated.<sup>282</sup> Nor can the Crown take an impoverished view of their lawful obligations.<sup>283</sup>

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<sup>273</sup> *Taylor and Williams*, *supra* note 166, *Badger*, *supra* note 9 at para 41, 47, *Sioui*, *supra* note 29 at para 1044, *Simon*, *supra* note 141 at para 401 and 410.

<sup>274</sup> *Badger*, *supra* note 9 at para 47, *Taku River*, *supra* note 4 at para 24.

<sup>275</sup> *Haida*, *supra* note 3 at para 19.

<sup>276</sup> *Taylor and Williams*, *supra* note 166 at 123.

<sup>277</sup> *Sundown*, *supra* note 138 at para 24, *Badger*, *supra* note 9 at para 78, *Sioui*, *supra* note 29 at para 1043, *Simon* *supra* note 141 at para 404.

<sup>278</sup> *Simon*, *supra* note 141 at para 402, *Sioui*, *supra* note 29 at para 1035, *Badger*, *supra* note 9 at para 52.

<sup>279</sup> *Badger*, *supra* note 9 at para 52-54, *Nowegijick*, *supra* note 244 at para 36.

<sup>280</sup> *Sioui*, *supra* note 29 at 1068-1069, *Badger*, *ibid*, at para 41.

<sup>281</sup> *Marshall*, *supra* note 9 at para 53, citing *Simon*, *supra* note 141 at 402.

<sup>282</sup> *Haida*, *supra* note 3 at para 19, *Marshall*, *supra* note 9 at para 49, *Badger*, *supra* note 9 at para 41.

<sup>283</sup> *Taku*, *supra* note 4 at para 24, where the court held that the Crown submissions were 'impoverished' when it asserted it owed merely a common law duty of fair dealing to the Indians whose claims may be affected by government decisions, and a duty to consult arises only after the rights have been proven, *Haida*, *supra* note 3 at para 28-34.

Implementing the treaty within the character of the honour of the Crown ensures that the intended Treaty promises will be effectively implemented by Crown. The treaties created implementation obligations on both the Crown and Indigenous Nations in International law and British law.<sup>284</sup> They require the administrators and courts to assume that the British Crown, its agents and the Indigenous Treaty Nations intended to fully comply with each promise, obligation, or right laid out in the Treaty negotiations and English Text.<sup>285</sup> The Indigenous treaty nations have been the only party to honour their part of the bargain. The honour of the Crown is required to act in the strictest sense.

Treaty-making attaches with it a Constitutional and fiduciary obligation for Canada to act as a trustee, representing an institution of the government. As such, there needs to be a constitutional change and understanding that the Treaty Constitutional order is of the same strength as the Canadian Constitutional order. The ability for the Crown to infringe upon Treaty rights is a violation and offence to the consensual treaty relationship. There is no legislative authority found in the Treaties and Treaty Indigenous people did not agree to be legislated over. In fact, Treaties are equal in strength as the legislative power. According to Indigenous law, Parliament cannot unilaterally effect a Treaty without the *consent* of the signatory Indigenous Treaty First Nations. The doctrine of the honour of the Crown exists to prevent infringements and encroachments on Treaty rights. The doctrine should operate to reject governmental regulatory schemes that are contrary to Treaty rights.<sup>286</sup>

The honour of the Crown is a constitutional, legal, moral and political obligation. The Crown's honour does not change with the political powers of the day. The Treaty Indigenous people are entitled to trust that their rights, as beneficiaries, will be implemented. Reparations for past injustices or treaty violations are due. The honour of the Crown doctrine ought to create the constitutional remedy of Treaty restitution, which

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<sup>284</sup> Henderson, "*Animating the Honour of the Crown*", *supra* note 236 at 27.

<sup>285</sup> *Ibid* at 13.

<sup>286</sup> *Mikisew*, *supra* note 5 at para 1 and *Marshall*, *supra* note 9 at para 63.



authorizes the provision of necessary services and to restore the damages of past colonial policies and paternalistic law to prevent further infringements of Treaty rights.<sup>287</sup>

That said, the precept of the honour of the Crown is rendered meaningless without a commitment to enforce its application and practice. The existence of s. 35(1) is a Constitutional obligation to ensure that the Crown lives up to its historical and legal obligations. The honour of the Crown requires an immediate reversal in the current approach the Federal Government has taken in resolving its lawful, yet outstanding obligations. The current approach is to stall and delay resolution of claims, forcing protracted negotiation and lengthy court battles. Evidence of that approach can be found in the number of cases where the Supreme Court has chastised government for undermining the relationship. Joint commitments by the Crown reflect this attitude as in the 1998 *Report of the Joint First Nations- Canada Task Force on Specific Claims Policy Reform* which recommended a variety of means to reduce delays in resolving specific claims. The Federal government, a partner in developing the report, choose not to implement any of its recommendations. As well, the *Report on the Royal Commission on Aboriginal People* has provided a comprehensive roadmap for government in a five-volume, 4,000-page report, with 440 recommendations calling for sweeping changes to the relationship. Yet again, none of recommendations were implemented by the Federal Government. The failure to make meaningful change and to provide what is owed through Treaty and outstanding claims, only increases the financial and human costs to the Indigenous nations. By continuing these failed processes, the Crown forces litigation. This inherently unfair as Indigenous Nations often do not have the depth of resources to continue a protracted legal battle. As well, delays keep necessary funds out of a community, forcing capitulation due to need. There is no long-term financial saving in this strategy as the costs of the maintaining communities in poverty greatly outweighs the short-term benefit to the Crown of not meeting its legal and constitutional obligations immediately. That is not honourable.

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<sup>287</sup> Henderson, “*Animating the Honour of the Crown*”, *supra* note 236 at 17.

### **3.4 CONCLUSION**

For Treaty implementation to be truly effective, Canada and its institutions need to revisit Indigenous legal orders and sovereignty by giving substantial importance to their existence rather than piece meal acknowledgements without any substance. This would require implementing a shared Constitutional order which better reflects the realities of Constitutional supremacy. It requires a formal recognition of the reserved inherent Indigenous sovereignty in the treaties.

It is the Crown's constitutional obligation to advance Treaty implementation. As well, as an interpretive principle of the Constitution in s. 52, the honour of the Crown obligates governments and courts to conduct itself in accordance with the rule of law and Constitutional supremacy in all its dealings with treaty nations. On the basis of the honour of the Crown, it is critical for the Crown to consult with treaty beneficiaries to implement the treaty promises. Treaty promises must be implemented without delay. The Crown must act in accordance with the honour of the Crown when engaging in the ongoing process of implementation treaty rights in Canada's constitution.

The government of Canada is responsible for upholding the honour of the Crown in their relationships with Treaty nations. Their obligation to uphold the honour of the Crown includes a fiduciary obligation or a mere responsibility to consult and possibly accommodate Treaty nations when their treaty rights have been negatively impacted. Upholding the honour of the Crown is required to manage the treaty relationship between Indigenous nations and the Crown.

In the spirit of Treaty implementation and managing the Treaty relationship, the Crown must work to rebuild trust with Treaty beneficiaries. Recognition of Treaty federalism will create government to government relations to ensure that Treaty First Nations are no longer excluded and ensure that their rights and interests are fully respected and protected. Through the concept of the honour of the Crown and treaty implementation, there is an opportunity to alter the course of Indigenous Crown relations.

Canada can change the future by distancing itself from colonial and assimilative policies that have brought the original people to a nation of marginalization and extreme poverty. The term reconciliation is imbued with respect for rights and can forge a new relationship properly marked by nation-to-nation relations in confederation.

The enshrining of Aboriginal rights in the Constitution was meant to prevent Federal, Provincial governments and even the judiciary from disregarding Treaty rights or their underlying principles. The protection offered by the Constitution was implemented not to make government or the courts' jobs easier, but to make them more just.<sup>288</sup> There is no honour in Canada denying and opposing the Indigenous rights and Treaty promises made to the Indigenous people. The Government of Canada spares no expense in denying their legal obligations of treaties, yet will vigorously argue 'their' treaty right to take up land. Consequently, Aboriginal governments continue to be nations on the defensive and as the *Royal Commission on Aboriginal Peoples* firmly concluded, "A nation on the defence does not make for good governance"<sup>289</sup> much less for honourable governance.

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<sup>288</sup> Henderson, "Animating the Honour of the Crown", *supra* note 236.

<sup>289</sup> See RCAP *Final Report* Vol. 1, *supra* note 42.

**CHAPTER 4**  
**THE CROWN'S CONSTITUTIONAL DUTY OF CONSULTATION TO TREATY**  
**RIGHTS HOLDERS**

*"Government and developers come to our communities and they tell us: "We're going to build a house." They tell us precisely where the house will be located, the design of the house, when it will be built, who will build it and who will live in it. Consultation occurs only when they ask us: "What colour would you like the house to be?" That's it. We are not asked if we want the house built, or what its design should be, merely what colour the house should be. Consultation, as it currently occurs, is mere rhetoric and window dressing."*

Grand Chief Stewart Phillip<sup>290</sup>

#### **4.0 INTRODUCTION**

When Governmental action affects the holders of Treaty rights, the duty to consult with the people affected ought to be axiomatic, a natural consequence given the nature of the rights at stake. However, a century of legislation and decades of jurisprudence have demonstrated that unilateral Governmental action has continued seemingly unabated. Treaty nations have persistently faced a lack of inclusion in processes and decisions that infringed their inherent and Treaty rights. Consultation, if it occurred, was regarded as procedural, at best.

This chapter will canvass the historical neglect of the Crown's duty to consult with holders of Treaty Rights to demonstrate that the requirement by the courts to hold governments accountable to consult has, for a number of years, been ignored. The failure to consult resulting in unilateral legislation over Treaty First Nation people in the *Indian Act* and *1930 Natural Resources Transfer Agreement*. Both of these laws remain pervasive obstacles for Treaty Nations. Next, the chapter will examine the legal duty of

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<sup>290</sup> Grand Chief Stewart Phillip, President, Union of B.C. Indian Chiefs, presentation to the "Consultation with First Nations: New Law and New Practices" conference, Pacific Law and Business Institute (2002).

consultation in Treaty rights cases which began with the Aboriginal rights and title cases.<sup>291</sup>

The duty to consult can be seen as judicial victory for First Nations people in the defence of their rights. It can also be seen an opportunity for reconciliation between the Crown and First Nations. At the same time however, the duty to consult reveals a continuation of Crown colonial authority premised upon a common law Aboriginal and Treaty rights paradigm that denies Indigenous legal and treaty orders, denies Indigenous sovereignty and fails to fully recognize Treaty rights. Examination of the legal duty to consult shows the breaches of the consensual Treaty relationship and fails to accord with International standards on the Rights of Indigenous people. Most importantly, consultation with Treaty rights holders should properly occur through Constitutional dialogue in Constitutional conferences which reflect the informed consent of the Treaty signatories.

#### **4.1 THE CROWN'S FAILURE TO CONSULT TREATY RIGHTS HOLDERS**

Historical unilateral royal land grants, legislation, regulations and agreements have fundamentally affected Treaty First Nation people in Canada. In 1670, King Charles II, by Letters Patent, granted 1.5 million square miles of land, known as Rupert's Land<sup>292</sup> to the Hudson Bay Company, who in 1868, transferred their interests back to the Dominion of Canada, without the consultation or consent of the Treaty people in that area.<sup>293</sup> It is noted in the negotiations of Treaty 4, that for the first four and one-half days of preliminary discussions, the negotiators for the Saulteaux nation refused to engage in

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<sup>291</sup> *Guerin, supra* note 2, *Sparrow, supra* note 178, *Delgamuukw, supra* note 39.

<sup>292</sup> Rupert's Land, Canadian territory held (1670–1869) by the Hudson's Bay Company, named for Prince Rupert, first governor of the company. Under the charter granted (1670) to the company by Charles II, the region comprised the drainage basin of Hudson Bay. The area embraced what is today the provinces of Ontario and Quebec North of the Laurentians and West of Labrador; all of Manitoba; most of Saskatchewan; the southern half of Alberta; the eastern part of Nunavut Territory; and portions of Minnesota and North Dakota in the United States. In 1870 the Hudson's Bay Company transferred Rupert's Land to Canada for 300,000 pounds sterling but retained certain blocks of land for trading and other purposes.

<<http://www.infoplease.com/ce6/world/A0842686.html#ixzz1lp1ZTJ4V>>

<sup>293</sup> *Order of Her Majesty in Council admitting Rupert's Land and North West Territory into Union*, 1870 [UK] RSC 1985 Appendix II, No 9.

substantive negotiations because they were upset that land, which was their territory, was “sold” to the Dominion of Canada without their consent. Sauteaux negotiator "Gambler" articulated their concern,

... The company have stolen our land. I heard that at first. I hear it is true. The Queen's messengers never came here... the Company have no right to this earth ... The Indians were not told of the reserves at all. I hear now, it was the Queen gave the land (to the HBC). ... The Indians did not know when the land was given [to the company].<sup>294</sup>

In 1876, while the Victorian treaties were being negotiated by Treaty Commissioners of the Queen, unilateral federal legislation was being enacted. Instead of implementing Treaties, the legislation created colonial laws. The Treaty only provided for certain regulation on reserves, but not in the ceded territory. The British agenda focused on expansion and the dispossession of the land from Indigenous people and that agenda has continued with the Crown's failure to recognize Indigenous legal orders and the Crown's failure to implement the sacred treaties.

As stated in the previous chapter, the Federal Crown, under the provisions of s. 91(24) of the *Constitution Act, 1867*<sup>295</sup> failed to consult with the Indigenous nations when it enacted unilateral and damaging federal legislation in the *Indian Act*.<sup>296</sup> The *Indian Act* was built on the disgraceful premise of Aboriginal inferiority, aimed at assimilation through the destruction of the Aboriginal culture. It usurped traditional Indigenous legal orders and structures and laws and enforced colonial law and ideals. Paternalistic, the *Indian Act* sought to control every aspect of First Nations lives including membership, banning of religious ceremonies, and strict control of the land and

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<sup>294</sup> Office of the Treaty Commissioner, "Statement of Treaty Issues", Chapter 2.7.1., *The Prairie Treaties of Saskatchewan - Treaties 4, 5 and 6*. The oral history of Treaty 4 First Nations in Saskatchewan is consistent on two points regarding the status of land ownership: the land was to be shared; and the newcomers had only a limited right to use that shared land.

<sup>295</sup> *The Constitution Act, 1867*.

<sup>296</sup> Canada, *Indian Act* (Ottawa: Minister of Supply and Services, 1989).

resources.<sup>297</sup> The *Indian Act* defined an Indian as not a person.<sup>298</sup> The powerful assimilative objective was made clear to Parliament by the Superintendent of Indian Affairs, Duncan Campbell Scott, when he stated, "Our objective is to continue until there is not a single Indian in Canada that has not been adsorbed into the body politic and there is no Indian question, and no Indian department."<sup>299</sup>

The *Indian Act* is a result of a failure to implement Treaty coupled with mistaken colonial assertion of sovereignty over Indigenous people. There was no authorization through any Treaty or British statute for the Provincial or federal governments of Canada to enact a legislative code over Treaty First Nations. Neither federal nor, later, Provincial legislative authority over Indians was agreed to in Treaty. The *Indian Act* should have rightly been the statutory form of Treaty implementation under s. 91(24) and s. 132, but instead was used as a comprehensive and damaging legislative tool over Indians. Canada's Parliament, under the pretext of parliamentary sovereignty began to legislate over Indians on matters not delegated to it by the Treaties. This legislative power by the Crown was false and outside of its competence.<sup>300</sup> The courts however, were not given

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<sup>297</sup> The devastating effects of *Indian Act* removed children from their homes under the guise of education. Free people were confined to the reserve and prohibited from leaving without a permit. Treaty Indian people lost their Indian status and benefits from Treaty if they became a lawyer, doctor, clergy, graduated from university or travelled abroad. Further, Treaty Indians were prohibited from making any claims against the Crown as the *Indian Act* made it illegal for monies to be raised or used for that purpose. Indigenous governments have been reduced to subordinate administrators to aid the federal government in administering reserves and have few responsibilities or abilities that are independent of federal oversight. Band governments can make a number of by-laws pertaining to traffic regulations, the establishment of dog pounds, noxious weed control, the regulation of bee-keeping and the maintenance of local infrastructure. Current band councils administer federal policies and programs such as health care, education and social services. The Federal Department of Aboriginal Affairs controls of all band funds including administrative and accountability requirements, the use of third party management protocols, and its ability to override election results. *Indian Act* Band councils are not true governments under the *Indian Act*.

<sup>298</sup> The *Indian Act*, SC 1876, c 18 s 12, An Act to amend and consolidate the laws respecting Indian, "The term person means an individual other than an Indian, unless the context clearly requires another construction."

<sup>299</sup> John, Leslie, Ron Maguire, eds., *The Historical Development of the Indian Act*, (Ottawa: Treaties and Historical Research Centre, Research Branch, Corporate Policy, Department of Indian and Northern Affairs, 1979) at 114.

<sup>300</sup> Henderson, "Treaty Federalism", *supra* note 24 at 276.

authority to question any federal enactment only whether the enactment was in its proper Constitutional authority.<sup>301</sup>

The *Indian Act* ignored the imperial relationship between the First Nations, the Crown and the government of Canada and ignored the Treaty obligations. The federal government became focused on the civilization and assimilation of Treaty First Nation people.<sup>302</sup> The *Indian Act* was unilateral, enacted without the consent of Treaty First Nations and neglected the sacred Treaty agreements. The *Indian Act* inconsistently applies power over Treaty First Nations across the land without regard to the specific Treaty terms each had signed and consented to. The Minister of Indian Affairs asserted power over every Treaty First Nations person's life with complete and total ownership of all land.

The *Indian Act* created devastating economic barriers preventing First Nations from taking advantage of the benefits of their own land and inherent and Treaty rights. Within the *Indian Act* there are no provisions for Indigenous Treaty land tenure. Agriculture, lumber, mining and any natural resources were strictly controlled under this law with the underlying title belonging to the Crown. The *Indian Act* represents the purest form of colonial law and controls First Nation land tenure, property and economic initiatives according to Eurocentric values.<sup>303</sup> The *Indian Act* has been widely recognized by Canadian courts and international forums as violating human rights, yet continues to be in force. Treaty First Nations assert that the passing of any colonial legislation affecting their rights, such as the *Indian Act*, is in direct violation of the Treaty

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<sup>301</sup> *Ibid*, citing *Ontario (AG) v Canada (AG)*, [1912] AC 571 at 583 (PC) and *British Railways Board v Pickin*, [1974] AC 765 (H.L.) where courts lacked jurisdiction to consider whether statutes have been procured by fraud.

<sup>302</sup> Henderson, "Treaty Federalism", *supra* note 24 at 277.

<sup>303</sup> Through the *Indian Act*, First Nations economic development projects and their relation to the land is often absent First Nation visions, and decision-making capacity on their community's priorities. Under the *Indian Act* title to reserve lands is held by the Crown. The *Indian Act* sets out the rules for managing First Nation land and focuses on the Federal Government role as central in dealings between the Indians and other parties. The *Indian Act* requires First Nation governments to surrender the land to the Federal Government in order for development to take place. Nowhere else in Canada do people have to give up their land in order to have a business or economic development initiative.



agreements. It was, and still is, a complete abrogation of the consensual partnership between respectful nations.

Unilateral legislation and the historical neglect of Treaty First Nation rights continued as the Crown, in 1930, in accordance with s. 109 of the *Constitution Act 1867*<sup>304</sup> transferred responsibility for public lands and resources to the four western prairie Provinces through the *Natural Resources Transfer Agreement (NRTA)*.<sup>305</sup> At the expense of the Treaty nations, the *NRTA* provided the new western Provinces with ownership and administration over the lands, minerals and other natural resources. However, this transfer was subject to existing trusts. The *NRTA* transfer occurred without the involvement or the consent of the Indian signatories of the treaties in those respective provinces. The Supreme Court in *Horseman*<sup>306</sup> and *Badger*<sup>307</sup> examined the effect of the *NRTA* on Treaty Rights and held that the *NRTA* effected a unilateral change to Treaty 8 by extinguishing the right to hunt commercially but preserving only the right to hunt for food. The court based its decision on a literal interpretation of the words “for food” in paragraph 12 of the *NRTA* which states:

In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.<sup>308</sup>

The court in *Badger* remarked that the federal government was empowered to enact the *NRTA* unilaterally, although it was unlikely that it would proceed in a unilateral manner

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<sup>304</sup> *The Constitution Act, 1867*, *supra* note 45. s. 109 states that ownership of the land and natural resources located in a province at union belongs to the Crown in right of the province.

<sup>305</sup> *The Natural Resources Transfer Agreement in Constitution Act, 1930* (UK) 20-21 Geo V c 26, reprinted in RSC 1985, App II No 25 [*NRTA*].

<sup>306</sup> *R v Horseman* [1990] 1 SCR 901, [1990] 3 CNLR 95.

<sup>307</sup> *Badger*, *supra* note 9.

<sup>308</sup> *NRTA supra* note 305 at para 12 .

today.<sup>309</sup> In the Court's view, this reduction of the Treaty right to hunt was counterbalanced by an expansion of the geographical area in which the Indians could hunt for food.<sup>310</sup> The effects of the unilateral transfer of resources and infringement of Treaty rights continue to impede Treaty First Nation people in the exercise of their rights. In Saskatchewan, the transfer of Crown lands, minerals and natural resources to the Province, coupled with the failure of the Province to set aside adequate lands with minerals in the fulfillment of Treaty Land Entitlement (TLE) and the failure to give priority to Treaty nations in the granting of Crown mineral dispositions, violates the Treaty agreements and the TLE Framework Agreement, so recently signed.<sup>311</sup> The *NRTA* continues to deeply affect the treaty relationship existing between the Provinces, Canada and Treaty rights holders.

## 4.2 THE JUDICIAL GENESIS OF CONSULTATION

The common law Aboriginal and Treaty rights paradigm is a result of the Crown's failure to implement the sacred inviolable Treaties and to recognize the legal and Constitutional orders of the Indigenous Nations. Each common law decision can be traced back to these systemic failures and has resulted in a very slow, incremental and painful drawing out of only some of the inherent and Treaty rights with the duty to

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<sup>309</sup> *Badger*, *supra* note 9 at para 72, 84, Cory J. stated, The *NRTA* only modifies the Treaty 8 rights. Treaty represents a solemn promise of the Crown. For the reasons set out earlier, it can only be modified or altered to the extent that the *NRTA* clearly intended to modify or alter those rights. The Federal government, as it was empowered to do, unilaterally enacted the *NRTA*. It is unlikely that it would proceed in that manner today. The manner in which the *NRTA* was unilaterally enacted strengthens the conclusion that the right to hunt which it provides should be construed in light of the provisions of Treaty 8.

<sup>310</sup> *Mikisew*, *supra* note 5 The Supreme Court of Canada in *Mikisew* rejects this argument.

<sup>311</sup> In 1992, Canada and Saskatchewan signed the *Treaty Land Entitlement Framework Agreement*, <<http://www.publications.gov.sk.ca/details.cfm?p=1023>>, and also signed *An Act to Confirm and Agreement between the Government of Canada and the Government of Saskatchewan Natural Resources Transfer Agreements*, ss 1993 c s-31.1 at <<http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/S31-1.pdf>>, in order to address the provincial obligations undertaken in the *TLE Framework Agreement*. Treaty First Nations groups and Provincial Aboriginal organizations have long lamented the lack of consultation by Canada in the *NRTA*. Treaty Nations affected by the *NRTA* convened a Western Treaty Nations National Resources Transfer Agreement (NRTA) National Summit, hosted by Manitoba Keewatin Okimakanak (MKO), the Treaty 8 First Nations of Alberta and the Prince Albert Grand Council (PAGC) in June 2011.

consult doctrine now acting as a conduit. The duty to consult doctrine has become a body of law mired in complexities and self-machinations. Courts, legal<sup>312</sup> and academic scholars have begun the process of sorting through the contours of the legal duty to consult.

It has been heralded as a victory for First Nations in the protection of their rights as it has put a constraint on the Crown's unilateral approach to First Nations. Yet, it continues the Crown's complete authority over Indigenous people and their rights. The genesis of the doctrine of the duty to consult and accommodate demonstrates that the Supreme Court of Canada's jurisprudence plays a central role in the continuation of the Crown's colonial authority premised upon an Aboriginal and Treaty rights paradigm that denies Indigenous sovereignty and fails to fully recognize the Treaty order and the legal and Constitutional rights of Treaty First Nations.

This judicial genesis of the legal duty of consultation began not with Treaty rights matters but with a series of Aboriginal right and title decisions.<sup>313</sup> Those decisions

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<sup>312</sup> See for a comprehensive review of the duty to consult, Newman, Dwight G. *The Duty to Consult: New Relationships with Aboriginal Peoples*. Saskatoon: Purich Publishing, 2009; Other publications include; Kirk Lambrecht, *"Aboriginal Consultation, Environmental Assessment and Regulatory Review in Canada"*, University of Regina Press, 2013; Maria Morellato, "The Crown's Constitutional Duty to Consult and Accommodate Aboriginal and Treaty Rights," National Centre for First Nations Governance Research Paper (2008); Heather Treacy, Tara L Campbell, Jamie Dickson, "The Current State of the Law on Crown Obligations to Consult and Accommodate Aboriginal Interests in Resource Development" (2007) 44 Alta L Rev 571; Keith Bergner, "Consultation Requirements in the Post-Treaty Context", Paper presented to Insight Aboriginal Law Forum, May 2006; Thomas Isaac & Anthony Knox, "The Crown's Duty to Consult Aboriginal People" (2003) 41 Alta L Rev 49; Patrick Macklem & Sonia Lawrence, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult (2000) 79 Can Bar Rev 252;

<sup>313</sup> Prior to the patriation of the Canadian Constitution, the Supreme Court in *Guerin*, *supra* note 2, found that the Crown had violated its fiduciary duty to the band by failing to consult with them when they accepted a lesser lease and unilaterally changed the legal position of the band, without their knowledge or consent. Justice Dickson stated "In obtaining, without consultation, a much less valuable lease than the promised, the Crown, breached the fiduciary obligation it owed the band." Then in 1990, the Supreme Court in *Sparrow*, *supra* note 178 deliberated its first post 1982 Aboriginal rights case to explore the content of s. 35 of the *Constitution Act, 1982*, where the court expressly limited Crown power and conduct by affirming a duty to consult with West Coast Salish asserting their inherent and constitutionally protected right to fish through a

recognized that interference with the rights of Aboriginal people required some form of consultation and provided the foundational principles. Eight years later, two Supreme Court cases on the duty to consult were released in *Haida Nation v British Columbia (Minister of Forests)*<sup>314</sup> and *Taku River Tlingit v. British Columbia (Project Assessment Director)*,<sup>315</sup> delineating a constitutional duty to consult and accommodate Aboriginal

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justification test where the duty to consult is one factor to be considered when justifying an infringement on Aboriginal rights. In 1996 the Supreme Court further developed foundational principles on the duty to consult in their adjudication of the definition of an Aboriginal right in *R v Van der Peet*, *supra* note 47. Next in 1996, another Supreme Court decision constraining crown power and affirming the duty to consult regarding resources to which Aboriginal peoples make claim was made in *Nikal*, *supra* note 185, where Cory J. wrote: "So long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement".<sup>313</sup> Similarly, the court in *R v Gladstone*, *supra* note 188, applied and modified the *Sparrow* justification test to the Heiltsuk Aboriginal right to harvest and sell herring spawn on kelp. The court held, "Questions relevant to the determination of whether the government has granted priority to aboriginal rights holders are those enumerated in *Sparrow* relating to consultation and compensation, as well as questions such as whether the government has accommodated the exercise of the Aboriginal right to participate in the fishery..." Then, in 1997 the Supreme court in *R v Delgamuukw*, *supra* note 39, expanded the scope of the duty to consult with the introduction of a spectrum on consultation, the greater the impact of the rights, the greater the consultation and in some cases, consent would be required.

<sup>314</sup> *Haida*, *supra* note 3, At issue was the question of what duty, if any, does the government owe the Haida people and whether they are required to consult with them about decisions to harvest the forests and further, to accommodate their concerns before they have proven their title to land and their Aboriginal rights. In its ruling, the court found that the Haida's claim to title to the area is strong. The Supreme Court provided several important principles on the duty to consult by holding that a claim of Aboriginal title to land exists even if not yet proven in court. "The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown, which must be understood generously. While the asserted but unproven Aboriginal rights and title are insufficiently specific for the honour of the Crown to mandate that the Crown act as a fiduciary, the Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. The court held that consultation and accommodation before final claims resolution preserve the Aboriginal interest and is an essential corollary to the honourable process of reconciliation that s. 35 of the *Constitution Act, 1982*, demands. any consultation process. It held, "...pending settlement, the Crown is bound by its honour of tie response to Aboriginal concerns."

<sup>315</sup> *Taku River*, *supra* note 4, Tlingit First Nation (TRTFN) opposed the effects of a proposal to reopen the Tulsequah Chief mine by building an industrial highway through the heart of the Tlingit's traditional territory. The Taku River First Nation participated in a environmental assessment process but disagreed with the recommendation report and sought to quash the approval of the project. The court found that the First Nations role in the environmental assessment was sufficient to uphold the Provinces honour and met the requirements of the duty.

rights holders.<sup>316</sup> These decisions were in the context of “asserted but unproven” Aboriginal right claims confirming the Crown’s duty when it has knowledge, real or constructive of the potential existence of an Aboriginal right or title and contemplates conduct that may adversely affect it. The broad principles in both cases inform the jurisprudence on the duty to consult Aboriginal right claims and are also used in the Treaty rights context.

#### **4.3 THE SUPREME COURT OF CANADA'S FRAMEWORK ON THE DUTY TO CONSULT TREATY RIGHTS HOLDERS**

The focus of this thesis is on the numbered Treaties which differ greatly from the modern Treaties. Modern Treaties exercise governance over lands and resources including planning, approvals and controls. They also address consultation requirements in the details of the agreements. The Supreme Court has considered consultation requirements under modern treaties in *Beckman v Little Salmon/Carmacks First Nation*

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By participating in the environmental review process which included measures to address its concerns, the court held that the Province was not under a duty to reach an agreement with the Tlingit people and their failure to do so did not breach its obligations. The court expected that the process of permitting and development of a land use strategy, the Crown would fulfill its honourable obligations. The court rejected the Province’s ‘impoverished vision of the honour of the Crown’ by arguing before the determination of rights through litigation or conclusion of a treaty, it owes only a common law “duty of fair dealing.” The Taku court affirmed the principle that the honour of the Crown, prior to proof of asserted rights or title, to be given full effect in order to promote the process of reconciliation mandated by s. 35(1) of the *Constitution Act, 1982*.

<sup>316</sup> The legal tests and principles expounded by the Supreme Court on the duty to consult guide lower courts to make the same determinations. There exist several lower courts decisions in Canada which articulate the duty to consult Aboriginal rights holders that spans both the 1990’s<sup>316</sup>, increasing after the 2005 *Haida* trilogy, through to 2010. *R v Bones*, [1990] BCJ No 2897 dismissed on appeal, *R v Bones*, 1993 CanLII 936 (BCSC), *R v Jack*, [1995] BCJ No 2632 (BCCA), *Halfway River First Nation v British Columbia (Minister of Forests)*, (1999) 64 BCLR (3d) 206 (BCCA), *Musqueam Indian Band v British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128, *Tsilhqot’in Nation v British Columbia*, [2006] BCCA 2, *R v Douglas*, [2006] BCSC 284, *Hupacasath First Nation v B.C.(Minister of Forest)*, [2005] BCJ No. 2653, *Hupacasath First Nation v British Columbia (Minister of Forests)*, [2006] 1 CNLR 22 (BCSC), *Native Council of Nova Scotia v Attorney General of Canada*, [2006] 2 CNLR 103 (FC), *R v Douglas*, [2006] 2 CNLR 140 (BCSC), *R v Douglas*, [2007] 3 CNLR 277 (BCCA), *R v Kapp*, CA 277, *Kruger v Betsiamites First Nation* [2006] QCCA 567, *Ahousaht Indian Band v Canada (Minister of Fisheries and Oceans)*, [2007] 4 CNLR 1 (FC), *Tsilhqot’in Nation v British Columbia*, [2008] 1 CNLR 112 (BCSC), *Standing Buffalo First Nation v Enbridge Pipelines Inc.*, 2009 FCA 308 (CanLII),

<sup>317</sup> and *Quebec (Attorney General) v Moses*, <sup>318</sup>. In *Beckman v. Little Salmon Carmacks* the court noted, “Where adequately resourced and professionally represented parties have sought to order their own affairs, and have given shape to the duty to consult by incorporating consultation procedures into a treaty, their efforts should be encouraged and, subject to such constitutional limitations as the honour of the Crown, the court should strive to respect their handiwork.”<sup>319</sup> The numbered Treaties, by contrast, must rely on the interpretation provided by the courts and cover the majority of the land mass in Canada. This thesis traces the court’s path in the litigation of the Treaty 8 people of the Mikisew Cree Nation.

The duty to consult’s relationship to Treaty rights was extended through the Supreme Court’s decision in *Mikisew Cree First Nation v The Minister of Heritage*.<sup>320</sup> The approach taken by the court parallels the jurisprudential treatment of Aboriginal rights in the justification test used to infringe Aboriginal rights which was applied, unmodified, to Treaty rights in *Badger*.<sup>321</sup> There the court acknowledged the difference between Aboriginal and Treaty Rights but stated although Treaty rights are the result of mutual agreement, they, like Aboriginal rights, may be unilaterally abridged. That decision remained consistent in *Cote*<sup>322</sup> where the court held that the justified infringement test applies with the same force and the same considerations to both species of Constitutional rights. Treaty First Nation people view infringement capability as a fundamental breach of the consensual foundation of the Constitutional obligations in Treaty.

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<sup>317</sup> *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 [*Little Salmon*]

<sup>318</sup> *Quebec (Attorney General) v Moses* 2010 SCC 17, [2010] 1 SCR 557.

<sup>319</sup> *Little Salmon*, *supra* note at para 54. The Court stated at para 46, “the parties themselves may decide therein to exclude consultation altogether in defined situations and the decision to do so would be upheld by the courts where this outcome would be consistent with the maintenance of the honour of the Crown.”

<sup>320</sup> *Mikisew Cree First Nation v The Minister of Heritage* [2001], 214 FCT 1426, 214 FTR 48 at para 4. [*Mikisew FCT*]

<sup>321</sup> *Badger*, *supra* note 9 at 771.

<sup>322</sup> *Cote*, *supra* note 179.

The Mikisew Cree Nation is a signatory to Treaty 8 who sought a judicial review of a Parks Canada decision, pursuant to the *Canadian Environmental Assessment Act* to expropriate land by building a winter ice road through their traditional territory, a decision which they foresaw would have had an injurious effect on their traditional lifestyle of hunting, trapping and fishing. Parks Canada provided the Mikisew Cree First Nation with a standard informational package and invited them to a public open house but did not directly engage in consultations about the road or its subsequent realignment. The Mikisew asserted the Crown breached its Constitutional and fiduciary duty under Treaty 8 to consult with them about the extent of the road's impact on their Treaty harvesting rights. The Mikisew were successful at trial but an appeal to the Federal Court ruled the Crown had no duty to consultation. Then the Supreme Court provided a definitive ruling on the application of the Crown's duty to consult Treaty right holders.

#### **4.3.1 Mikisew Cree First Nation v. The Minister of Heritage - Federal Court Trial Division**

The Federal Court Trial Division found the open houses and public notices were insufficient given the nature and scope of the impact the road would have on the Cree's harvesting rights. An injunction against the ice road was issued. The Federal Court found that the Mikisew were entitled to a distinct process as the right at risk was a Constitutional one.<sup>323</sup> The Crown set forward several arguments including that the Treaty rights of the Mikisew were extinguished when the Park was created or by statute; all levels of the court rejected both of these extinguishment arguments.<sup>324</sup> After trial, the Federal Court found that the proposed winter road would create a geographical limitation which would have a injurious effect on the exercise of the Treaty-protected hunting rights. Justice Hansen held that the court's duty was not to reconcile existing Treaty rights by accommodating non-aboriginal interests, rather it is one of the responsibilities

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<sup>323</sup> *Mikisew FCT*, *supra* note 320 para 170-171, Hansen J., determined that, ...the Cree did not breach their reciprocal obligation by refusing to participate in the open houses and public comment because what is at stake was a constitutionally protected Treaty right. The First Nation was more than just a stakeholder, at the very least, Mikisew is entitled to a distinct process if not a more extensive one.

<sup>324</sup> *Ibid.*

and obligations of the Crown toward Treaty First Nation people.<sup>325</sup> It held that the social and economic interests of those who would benefit from the road were not a compelling and substantial enough objective to curtail the Cree's right to hunt and trap. Therefore, the Court held, the Crown failed to justify the infringement.<sup>326</sup>

Justice Hansen noted that with Treaty rights the court's role in s. 35 was Treaty implementation rather than Constitutional reconciliation. She noted that the court in *Marshall* did not demand the reconciliation of Treaty rights as the main purpose of s. 35, nor to focus on the economic interests of non-aboriginals. Instead, the court focused on the responsibility of the Crown to Treaty First Nations. The Federal Court held that the social and economic interests of others through an 'enhanced regional transportation network', (the winter road) was not a compelling and substantial objective that would justify weakening the Mikisew's treaty right to hunt and trap.<sup>327</sup> As the compelling and substantial legislative objective failed, the Federal Court did not need to decide whether the Crown's actions were consistent with their fiduciary duty but answered the question to be sure. The court reviewed the actions of the parties including the communications.

In reviewing the communications, Justice Hansen determined despite emails, meetings, phone calls and open houses attended by two trappers, it was insufficient. The court held that the onus of proof on the consultation engaged is with the Crown, not the Indians.<sup>328</sup> The Treaty First Nation did not have to prove that the government did not adequately consult with them. It did find that consultation is reciprocal, a two way street in which the Aboriginal group cannot remain complicit.<sup>329</sup> The court was careful to point out the participation does not mean 'informed consent', nor did it give the Treaty beneficiaries veto over the proposed action. However, they cannot frustrate, refuse, impose demands and then complain about the efforts of consultation.

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<sup>325</sup> *Ibid* at para 120-122.

<sup>326</sup> *Ibid* at para 122.

<sup>327</sup> *Ibid* at para 120-122.

<sup>328</sup> *Ibid* at para 157.

<sup>329</sup> *Ibid*.



The trial court in *Mikisew* held that the duty does not mean that whenever a government proposes to do anything in the Treaty 8 surrendered lands it must consult with all signatory First Nations, no matter how remote or unsubstantial the impact. But the duty to consult is triggered at a low threshold and adverse impact is a matter of degree as is the Crown's duty. In this case, it was found that the impacts were clear, established and demonstrably adverse to the Treaty rights holders' hunting and trapping rights.<sup>330</sup> The court held that the timing of the consultation is an indication of genuine consultation; the Mikisew Cree were not included in the early stages and decisions had been effectively made without their input.

The Crown argued that the Mikisew Cree were provided meaningful opportunities to participate and relied on *Halfway River v. British Columbia*.<sup>331</sup> However, the trial court held that line of authority was in tension with other cases which suggest that consultation must be conducted in good faith with the intention of substantially addressing the concerns of the First Nations.<sup>332</sup> The court drew on *Halfway River* to demonstrate the content of the duty imposes a positive obligation to ensure that all information is provided in a timely manner for the Cree to express their concerns and have them taken

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<sup>330</sup> *Ibid* at para 55.

<sup>331</sup> *Halfway River First Nation v BC* [1999] BCJ No 1880 (CA) the British Columbia Court of Appeal found that the government breached its duty to consult when approving an application for a permit for logging on Crown land, adjacent to the Halfway River First Nation. The Halfway Nation people are descendants of the Beaver People who were signatories to Treaty 8 in 1900 and claimed the area under the Treaty wherein they practiced the traditional right to hunt. Additionally the Halfway Nation had an outstanding Treaty Land Entitlement Claim against the federal Crown that may have included lands recoverable in the area where the permit was granted. The Halfway River First Nation argued a unjustifiable infringement on their hunting rights under the Treaty and breach of administrative law duty of fairness in the application of government policy by the District Manager by failing to give adequate notice of his intention to decide the question, and failing to provide an adequate opportunity for the Halfway people to be heard. The government argued the Halfway First Nations right under Treaty 8 to hunt is subject to the Crown's right to "require", or "take up" lands from time to time for, among other purposes, "lumbering"; and that the issuance of permit did not breach or infringe the treaty rights to hunt. Alternatively, they argued that if the treaty right to hunt was breached, that breach was justified within the *Sparrow* test. The court concluded that the only lack of procedural fairness in the decision-making process of the District Manager was the failure to provide to the Halfway River First Nation an opportunity to be heard. The court also concluded that the issuance of the cutting permit infringed the Halfway River First Nations treaty right to hunt and that the Crown has failed to show that infringement was justified.

<sup>332</sup> *Mikisew FCT*, *supra* note 320 at para 151.

seriously and integrated into the proposed plan.<sup>333</sup> Justice Hansen held that the Mikisew had not breached their reciprocal obligations or frustrated the process. She rejected the Crown's submission that the Cree were treated to the same consultation as all other stakeholders, on the basis that what was at stake for the Cree was the infringement of a constitutionally protected right. The Mikisew were, at the very least, entitled to a distinct process if not a more extensive one.<sup>334</sup> The court held the fiduciary relationship and the Constitutional status demand priority.<sup>335</sup>

The trial court in *Mikisew* looked at the timing of consultations as indicative of whether there was a genuine intention of addressing the First Nation concerns.<sup>336</sup> In this case, the Mikisew's concerns were not addressed at the planning stage and they were not engaged until the decision had essentially been made, without the Treaty First Nation's concerns in the process. The Federal Court found that the duty to consult intersects with other elements of the fiduciary duty owed by the Crown. In *Sparrow*, the Supreme Court emphasized the question of whether Crown had given adequate priority to the First Nations' rights over other community interests.<sup>337</sup> The court noted that if the consultation did not occur in that manner, that the Minister's decision would have been challenged as the constitutional rights were not given adequate priority.<sup>338</sup>

The court found there was not serious consultation with the Mikisew to ensure minimal impairment of their Treaty rights. Justice Hansen also found that there was an 'air of secrecy' in the consultation process engaged by the Crown with the Mikisew. The importance of good faith negotiations includes transparent inquiries into the Mikisew concerns about the road and that the Indians might have knowledge that is not available

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<sup>333</sup> *Ibid* at para 131.

<sup>334</sup> *Ibid* at para 152- 153.

<sup>335</sup> *Sparrow*, *supra* note 178 at para 65,70, 81-83, wherein the SCC examined the question of whether the Indians food fishing interests were given priority over the interests of the general community. It held that the Indians were entitled to the distinct process given their constitutional status and the fiduciary relationship.

<sup>336</sup> *Mikisew FCT*, *supra* note 320 at para 154.

<sup>337</sup> *Sparrow*, *supra* note at para 65, 70.

<sup>338</sup> *Mikisew FCT*, *supra* note 320 at para 155.

to the Crown.<sup>339</sup> The court noted that minimal impairment is not difficult to determine and could be achieved by asking the Mikisew a simple question of what would be the most favorable route in their opinion.<sup>340</sup> Genuine efforts are required to ensure consultation reveals the impacts upon the Constitutional rights by the Treaty beneficiaries. The decision was appealed to the Federal Court of Appeal.

#### **4.3.2 The Federal Court of Appeal**

The Federal Court of Appeal, however, set aside the trial court decision on the basis that the land taken for the winter road was properly seen as 'taking up' and that there was no legal duty to consult with the Mikisew although it would be good practice.<sup>341</sup> Justice Rothstein held that the taking up of land for the road was within the Treaty and not an infringement of the right. The court held that the park was vested in the government of Canada and that transportation was an implied purpose for which the land could be taken up.<sup>342</sup> The majority reasoned that settlement, mining, lumbering and trading all necessarily imply access and transportation. In turn, access and transportation necessarily imply the construction of roads and therefore is another purpose for which land may be taken up. The court held that those lands taken up where provided in Treaty did not include s. 35(1) rights. It reasoned that s. 35 protected the right to hunt on land that is not required for settlement, mining, lumbering, trading or other purposes.<sup>343</sup> Consequently, it held that if there is no infringement, there is no duty to consult.

The court stated that Alberta's argument based the interpretation of Treaty 8 on principles of contract law. If one of the terms of the contract gives a party a unilateral right to take certain action, then the contract is not breached if that action is taken. A

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<sup>339</sup> *Ibid*, at para 174.

<sup>340</sup> *Ibid* at para 174.

<sup>341</sup> *Mikisew Cree First Nation v The Minister of Heritage* [2004] 3 FCR 436, 2004 FCA 66 at para 24. The majority stated that the Minister was not obligated to consult under the taking up clause but it would have been good practice. However, the advisability and extent of such consultation was within the Minister's discretion.

<sup>342</sup> *Ibid* at para 13.

<sup>343</sup> *Ibid* at para 14, 18, and 21.

literal reading of Treaty 8 gives the Crown the unilateral right to remove land permanently for settlement, lumbering, mining or other purposes. This argument would allow the Crown unfettered authority to take lands without a duty to consult, negotiate or even give advanced notice to the Mikisew.<sup>344</sup> The Federal Court of Appeal held that taking up land is not an infringement unless it is taken up in bad faith or so much land has been taken up that there is no meaningful right to hunt remaining.<sup>345</sup> In following *Badger*, the court held the Treaty right was ‘suspended’ if land taken up is used for a purpose that is visibly incompatible with the right.<sup>346</sup> The court held, “as the approval of the road constituted a taking up within the meaning of Treaty 8, the Mikisew’s treaty right to hunt on the road corridor is suspended for as long as it is being used for a purpose visibly incompatible with hunting. There therefore has been no infringement of Treaty 8, as constitutionalized by s. 35, that requires the application of the Sparrow test.”<sup>347</sup>

The Federal Court of Appeal did not concern itself with the Honour of the Crown and the consensual nature of the Treaties. It did not read that the taking up of land provision as being a discretionary, not a mandatory provision, temporarily from time to time and not permanent and comprehensive.<sup>348</sup> The taking up provisions created a treaty tenure where the treaty right to harvest was still central and enduring.<sup>349</sup>

The minority decision however, held that the Crown’s right to take up land is not absolute and unfettered and the Minister’s decision, rather than the legislation, constituted a violation of the treaty right.<sup>350</sup> It relied on the majority decision in *Badger* which held that the Treaty First Nation were willing to accept settlement and other uses of the land that would restrict their right so long as sufficient unoccupied land remained to allow a continuation of their way of life.<sup>351</sup> Again, the treaty order allowed for the

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<sup>344</sup> *Ibid* at para 120.

<sup>345</sup> *Ibid* at para 19.

<sup>346</sup> *Badger*, *supra* note 9 at para 23, the court held that hunting on land with a occupied farmhouse was incompatible and therefore the Treaty right did not extend to that area.

<sup>347</sup> *Mikisew FCA*, *supra* note 341 at para 23.

<sup>348</sup> Henderson, *Treaty Rights*, *supra* note 52 at 913.

<sup>349</sup> *Ibid*.

<sup>350</sup> *Mikisew FCA*, *supra* note 341 at 117.

<sup>351</sup> *Badger*, *supra* note 9 at para 54-58.

taking up of land from time to time, to be conditional on the continuation of the Treaty First Nation's rights of harvesting and hunting. The dissent relied on *Halfway River*, where the court held that the Crown's right to take up land under treaty is not stronger than the Treaty Indian's rights under the same Treaty. It held, "Assuming, without deciding, that the Crown's right to take up land has constitutional status, that right cannot be stronger than any other constitutional power of the Crown, including the constitutional power that the Crown sought to exercise in *Sparrow*. In my view the fact that the Crown asserts its rights under Treaty 8 can place it in no better position *vis a vis* a competing or conflicting Aboriginal treaty right than the position the Crown enjoys in exercising the powers granted in either s. 91 or 92 of the *Constitution Act, 1967*."<sup>352</sup> This decision was appealed.

#### **4.3.3 The Supreme Court of Canada**

The decision of the Supreme Court of Canada in *Mikisew* began with the historical context of Treaty 8 and the court's observation that the post Confederation numbered Treaties were designed to open the Canadian west to settlement and development. Treaty 8 guaranteed:

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.<sup>353</sup>

The court noted that from the outset there existed an 'uneasy tension' between First Nations' expectation that they were as free to live off the land after Treaty as before, and

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<sup>352</sup> *Mikisew FCA*, *supra* note 341 at para 123, *Halfway River*, *supra* note 331 at para 129.

<sup>353</sup> Treaty 8, signed on June 21, 1899.

the Crown's expectation of increasing numbers of settlers moving into the surrendered territory. The court stated, "None of the parties in 1899 expected that Treaty 8 constituted a finished land use blueprint."<sup>354</sup> Treaty 8 was meant to explain the relations that would govern future interactions and thus prevent any trouble. The court noted that the Treaty Commissioners who negotiated the Treaty, could therefore, express confidence to the First Nations that "the same means of earning a livelihood would continue after treaty as existed before it."<sup>355</sup>

Speaking for a unanimous court, Justice Binnie found that the language of the treaty could not be any clearer in expressly limiting the Treaty right to land not required or taken up, however, the Crown was bound to implement an honourable process when taking up lands.<sup>356</sup> The court outlined the process of treaty implementation in which lands may be transferred from one category, where First Nations people have the right to hunt and fish, to the other category, where they do not. The court found that when the Crown exercises its Treaty 8 right to take up land, the honour of the Crown doctrine in Constitutional law dictates the process. A key question in taking Treaty lands is whether the degree of the adverse effect on the rights is sufficient to trigger the duty to consult.<sup>357</sup> The court held the winter road was a permissible purpose for taking up Treaty 8 land. The court was satisfied that the impacts of the proposed road were clear, established, and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question. In particular, the fragmentation of wildlife habitat, disruption of migration patterns, loss of vegetation, increased poaching due to motor vehicle access and increased wildlife mortality due to motor vehicle collisions adversely affected the Mikisew Treaty rights to hunt and trap.<sup>358</sup> Further, the adverse effects were sufficient to engage the duty to consult.

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<sup>354</sup> *Ibid* at para 27.

<sup>355</sup> *Ibid* at para 30.

<sup>356</sup> *Ibid* at para 31.

<sup>357</sup> *Ibid* at para 33-34.

<sup>358</sup> *Ibid* at para 44.

In describing the proposed “taking up”, the court held that it is not correct to move directly to a *Sparrow* justification analysis, as the lower courts did, even if there is an infringement. Rather, the court must first consider the Crown’s process and whether it is compatible with the honour of the Crown.<sup>359</sup> This means that the first consideration is the process by which the taking up is planned and whether the process and consultations are honourable. If it is not, the First Nation may be entitled to succeed in setting aside the Minister’s order on the process ground, whether or not the facts of the case would otherwise support a finding of infringement of the hunting, fishing and trapping rights. Thus a court can deny a project approval due to inadequate consultation even if the project would have been justified had consultation taken place.

The court found that the winter road was a minor infringement. The court applied many principles of Crown consultation articulated in *Haida*, to this Treaty context. “The duty to consult is ... triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown’s duty.”<sup>360</sup> The court found that the Crown’s treaty right to take up surrendered lands brings several duties: first, a duty to inform itself of the impact its project will have on the exercise by the Mikisew of their treaty hunting, fishing and trapping rights, second, an obligation to communicate its findings to the Mikisew Cree Nation,<sup>361</sup> and third, an obligation “to act in good faith and with the intention of substantially addressing the Mikisew concerns.”<sup>362</sup> The court notes that under Treaty 8, the First Nations’ Treaty rights to hunt, fish and trap are limited geographically and by specific forms of government regulation, as in *Badger*,<sup>363</sup> but also by the Crown’s right to take up lands and subject to its duty to consult.<sup>364</sup>

The court further held that the Crown’s honour infuses every treaty and the performance of every treaty obligation.<sup>365</sup> But “this does not mean that whenever

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<sup>359</sup> *Ibid.*

<sup>360</sup> *Ibid* at para 55.

<sup>361</sup> *Ibid.*

<sup>362</sup> *Ibid* also quoting *Delgamuukw* at para 168.

<sup>363</sup> *Ibid* at para 42, referring to *Badger*, *supra* note 9 at para 37.

<sup>364</sup> *Ibid.*

<sup>365</sup> *Ibid* at para 33, quoting *Haida* at para 19.

government proposes to do anything in the Treaty 8 ... lands it must consult with all signatory First Nations, no matter how remote or unsubstantial the potential impact.”<sup>366</sup> It held, therefore, that Treaty 8 provided the Mikisew Cree Nation with both procedural rights, such as consultation, and substantive rights of hunting, fishing, and trapping.

Infusing the honour of the Crown into the interpretation and application of Treaty 8, it:

... gives rise to Mikisew procedural rights (e.g., consultation) as well as substantive rights (e.g., hunting, fishing and trapping rights). Were the Crown to have barreled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its procedural obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's substantive treaty obligations as well.<sup>367</sup>

Justice Binnie rejected the Federal Court of Appeal’s finding that no breach of the duty to consult occurred based on his rejection of the Crown’s argument that the duty to consult was discharged in 1899 by the pre-treaty negotiations.<sup>368</sup>

Here the most important contextual factor is that Treaty 8 provides a framework within which to manage the continuing changes in land use already foreseen in 1899 and expected, even now, to continue well into the future. In that context, consultation is key to achievement of the overall objective of the modern law of treaty and aboriginal rights, namely reconciliation.<sup>369</sup>

Displacing the Mikisew from their hunting grounds violated the treaty promise that the Indians’ right to hunt and fish would continue after the treaty, as the right existed before.<sup>370</sup> The Court correctly noted that the Treaty 8 Indians paid dearly “for their entitlement to honourable conduct on the part of the Crown; surrender of the aboriginal interest in an area of land larger than France.”<sup>371</sup> The trial court in *Mikisew* wrote, “... it

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<sup>366</sup> *Ibid* at para. 55.

<sup>367</sup> *Ibid* at para 57.

<sup>368</sup> *Ibid* at para. 54-55.

<sup>369</sup> *Ibid* at para 63.

<sup>370</sup> *Ibid* at para 47, quoting *Badger*, *supra* note 9 at p. 5.

<sup>371</sup> *Mikisew*, *supra* note 5 para 52.



is not consistent with the honour of the Crown, in its capacity as fiduciary, for it to fail to consult with a First Nation prior to making a decision that infringes on constitutionally protected treaty rights.”<sup>372</sup> The Supreme Court of Canada held, “... consultation in advance of interference with existing treaty rights is a matter of broad importance to the relations between aboriginal and non-aboriginal peoples.”<sup>373</sup> The Court posits the Treaty as a vehicle to govern and manage ongoing relations with the objective of reconciliation. However, the Court held, that since the proposed winter road is on surrendered land, the Mikisew rights were expressly subject to the Crown’s ability to take up land for public purposes. As such, the duty lay at the low end of the spectrum.<sup>374</sup> The Court noted that the Minister of Heritage strongly advocated that this unilateral Crown action was lawful, an argument the Court rejected because such unilateral Crown action was inconsistent with “the mutual promises of the treaty, both written and oral, ... [and] is the antithesis of reconciliation and respect.” The Court continued:

It is all the more extraordinary given the Minister’s acknowledgment at para. 41 of her factum that “[i]n many if not all cases the government will not be able to appreciate the effect a proposed taking up will have on the Indians’ exercise of hunting, fishing and trapping rights without consultation.”<sup>375</sup>

The Court found that the duty to consult flows from the honour of the Crown<sup>376</sup> and that the government’s approach, undermined the process of reconciliation between the Crown and the Treaty 8 First Nation. Advance consultation prior to the interference is of great importance and goes to the heart of the relationship.<sup>377</sup>

The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along. Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chipewyan in 1899 was not the

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<sup>372</sup> *Mikisew FCT*, *supra* note 320 at para 157.

<sup>373</sup> *Mikisew SCC*, *supra* note 5 at para 3.

<sup>374</sup> *Ibid* at para 64.

<sup>375</sup> *Ibid* at para 49, Binnie J., in reference to the arguments advanced by the federal and Alberta governments which ignore the significance and practicalities of a First Nation’s Traditional Territory.

<sup>376</sup> *Ibid* at para 4.

<sup>377</sup> *Ibid* at para 3.

complete discharge of the duty arising from the honour of the Crown, but a rededication of it.<sup>378</sup>

The Supreme Court properly found the Crown's duty to consult Treaty rights holders was breached. This decision does not, however, resolve any systemic problems in Treaty interpretation imbued in the doctrine of Treaty rights. The *Mikisew* court has held that the Crown, as a Treaty partner, will always have notice of the contents of the Treaty but went on to indicate that there will be instances where asserted Treaty rights will not always engage the duty to consult.<sup>379</sup> The *Mikisew* court entrenched mechanisms for lawful infringement of Treaty rights when the Crown takes up of land; and it applied the test for justifying or allowing infringement of Aboriginal rights from *Haida* and *Taku*, to Treaty rights and peoples. Indigenous Treaty people have long asserted that Treaty did not intend the taking up provisions to be blanket surrender of the land. Surrender provisions and the duty to consult jurisprudence have again highlighted this long standing difference in Treaty interpretation.

#### **4.4 CONSULTATION, PROTECTION OR AVENUE OF INFRINGEMENT?**

The jurisprudence establishes that if the Crown makes reasonable efforts to consult and perhaps accommodate Aboriginal concerns, that all parties will participate in good faith and reach fair resolutions without needing assistance from the courts. It essentially holds that if the Crown conducts an appropriate degree of consultation and if the Crown makes reasonable efforts at accommodating the Treaty rights at stake, then the courts are prepared to accept the outcomes.<sup>380</sup> The court has held that it is more concerned if consultation had not occurred than if the process is imperfect, so long as the Crown made a reasonable effort.<sup>381</sup> The court has found the standard of review of

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<sup>378</sup> *Ibid* at para 54.

<sup>379</sup> *Ibid* at para 34 and 55.

<sup>380</sup> *Native Council of Nova Scotia v Canada*, 2008 FCA 113, 165 ACWS (3d) 1 [2008] 3 CNLR 286 at para 89; *Labrador Métis Nation v Newfoundland and Labrador (Minister of Transportation and Works)* 2007 NCLA 75, 288 DLR (4th) 641 at para 52; *R v Lefthand*, 2007 ABCA 206, 77 Alta LR (4th) 203 at para 42; *Hupacasath First Nation v British Columbia (Minister of Forests)* 2008 BCSC 1505 [2009] 1 CNLR 30 at para 252.

<sup>381</sup> *Haida*, *supra* note 3 at para 62, 63.

correctness applies if the Crown misunderstood the seriousness of the Aboriginal rights claim and or the adverse effect of infringement.<sup>382</sup> Where the Crown correctly understands the rights claimed and the adverse impact of the infringement, courts will review the nature and degree of consultation and accommodation on the reasonableness standard.<sup>383</sup> The honour of the Crown and reasonableness standard is invoked and not a fiduciary standard.<sup>384</sup> Can a reasonableness standard adequately protect Treaty rights and their vulnerability under the current common law treaty rights paradigm? Simply because consultation follows the standards set by the court, it does not mean the result is just.

The court has also indicated that s. 35 rights can only be infringed for compelling and substantial reasons such as conservation, to ensure long term sustainability for a resource, was the appropriate standard. Public policy reasons were explicitly rejected by the court in *Sparrow* as so vague to provide no meaningful guidance and so broad to be unworkable to justify infringing constitutional rights.<sup>385</sup> As well, in *Gladstone*, the court held that the guarantee of s. 35 rights provided substantive and procedural rights which required the Crown to justify the process and result when allocating a resource.<sup>386</sup> The court's balancing of interests pits Aboriginal rights holders against the interests of others.<sup>387</sup> The court in *Haida, Taku and Mikisew*, undertook a balancing of interests but not for the purpose of conservation, *i.e.* to protect a natural resource, but rather to maximize the benefits for non-Aboriginal people, despite the adverse effects on the constitutional rights holder. At a systemic level, these governmental and judicial decisions about balancing interests are erroneous because the scale is faulty. Because the current common law system and Crown policies do not recognize the Treaty legal order as an equal Constitutional authority, Treaty rights are not given due weight and accord. The court has undertaken a path where routine public policies justify infringing Constitutionally-protected Treaty rights. The *Mikisew* court held that where Treaty is at

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<sup>382</sup> *Ibid* at para 63.

<sup>383</sup> *Ibid* at para 62.

<sup>384</sup> *Ahousaht Indian Band v Canada (Minister of Fisheries and Oceans)* 2008 FCA 112 at para 54; *Saulteaux First Nation v British Columbia (Oil and Gas Commission)* 2004 BCCA 286.

<sup>385</sup> *Sparrow*, *supra* note 178 at para 72.

<sup>386</sup> *Gladstone*, *supra* note 188 at para 62.

<sup>387</sup> *Mikisew*, *supra* note 5 at para 1.

issue, the Crown will always have notice of the Treaty's contents and the only question then is the adverse effect on those rights.<sup>388</sup> Potential significant infringement engages the Crown's honour and requires consultation according to the spectrum offered in *Haida*. Therefore, according to the jurisprudence, all that is required is for the Crown to undertake some minimally reasonable degree of consultation and, a non-mandatory attempt at agreement or accommodation and the Crown would have fulfilled its legal duties. Where then, does this leave Treaty rights holders?

In *Haida*, *Taku* and *Mikisew*, the courts have held that consultation is a two way street and Aboriginal parties are required to act in good faith, not frustrate or take unreasonable positions to thwart the process.<sup>389</sup> Aboriginal parties have a duty to participate and express their concerns; they cannot make unreasonable demands.<sup>390</sup> At the same time, the doctrine of the duty to consult does not require the Crown to act as a fiduciary or be loyal to fiduciary-like principles. This means that the Crown has no obligation to accede to every request for further consultation or to accommodate every Aboriginal concern. Even if the courts require the Crown to be reasonable, First Nation people will be forced to live with the results, as *Taku River* demonstrates. First Nation people, therefore, have reason to be cautious about how they engage in consultation and must consult in a manner that equips First Nations for judicial review, namely, by keeping records and other evidence that shows they did not frustrate the Crown's attempts to consult and that the Crown's consultation process was inadequate.<sup>391</sup> In effect, the court is forcing the Aboriginal party to engage in an adversarial project whether it wants to or not. This is not honourable nor does it demonstrate the spirit of reconciliation or posit Canada in a post-colonial era.

Even where Aboriginal rights are established, the *Haida* court has held the Crown need not obtain the consent of the First Nation whose rights are infringed. Further, the

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<sup>388</sup> *Ibid* at para 34.

<sup>389</sup> *Haida*, *supra* note 3 at para 42.

<sup>390</sup> *Halfway River*, *supra* note 331 at para 161.

<sup>391</sup> Timothy Hoyer, "Honour of the Crown: The Approach to Crown-Aboriginal Reconciliation" (2006) 21 WRLSI 33 at 9. [Hoyer, "Honour of the Crown"].

consent spoken about in *Delgamuukw* is required only in rare cases where there are established rights.<sup>392</sup> The *Mikisew* court stayed consistent with *Haida* and *Taku* in expressing that the Mikisew had no veto on the project stating, "Had the consultation process gone ahead, it would not have given the Mikisew veto over the alignment of the road. As emphasized in *Haida*, consultation will not always lead to accommodation, and accommodation may or may not result in an agreement."<sup>393</sup> The court outlined that the *Mikisew* had a reciprocal duty to make their concerns known, respond to government attempts to address the concerns and to try to reach a mutually satisfactory agreement. Even in this recent *Mikisew* decision, several principles in the duty to consult doctrine show colonial ideology persists: first, permitting infringements though the Treaty First Nation opposed or did not agree to the infringement, second, forcing or requiring Treaty First Nations to participate in every consultation/accommodation process, and third, allowing some infringements that do not substantially impair Treaty rights with no consultation or notice to the First Nation, whatsoever..

The results of the lack of any requirement to obtain consent of the First Nation were made frighteningly clear in the Ontario Supreme Court decision in *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*.<sup>394</sup> The court considered whether to extend an injunction preventing a junior drilling company (Platinex) from exploration drilling on the Kitchenuhmaykoosib Inninuwug (KI) First Nation's traditional lands, lands which were subject to a pending Treaty Land Entitlement claim. The lower court found the Crown breached the duty to consult and the court granted a five-month injunction in favour of the KI for the parties to come to an agreement. The court also stated that the

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<sup>392</sup> *Haida*, *supra* note 3 at para 48.

<sup>393</sup> *Ibid* at para 66.

<sup>394</sup> *Platinex Inc. v Kitchenuhmaykoosib Inninuwug First Nation*, [2007] 3 CNLR 181 (Ont SCJ). The KI are signatory to the 1929 adhesion to Treaty 9, The James Bay Treaty, and provided notice to the government of its Treaty land entitlement claim. Platinex held unpatented mining claims and leases in the KI's claimed area, which were about to expire and needed an extension. The Province of Ontario continued to grant approvals both before and after the claim. While negotiations for the TLE claim were ongoing, the KI declared a moratorium on development and when Platinex entered the site to drill, they were confronted the KI members. Both parties initiated legal proceedings against the other. The KI's consultation protocol was not followed by Platinex and the court noted that the federal and provincial Crowns were standing on the sidelines as passive observers, at para 127.

injunction enhances public interest by making the consultation process meaningful and by compelling the Crown to accept its fiduciary obligations and to act honourably.<sup>395</sup> Despite the parties' efforts, no agreement was reached at the end of the five month period. Back before the court, the Ontario Supreme Court dismissed the First Nation's interlocutory injunction application through a balancing of interests and stated that unestablished Aboriginal rights do not automatically trump competing rights, whether they be government, corporate, or private in nature.<sup>396</sup> The court found that the balance of convenience favored the Company because granting the injunction would cause irreparable harm to Platinex and would likely put the company out of business.<sup>397</sup> The court held that on the evidence presented, the harm to the harvesting rights, culture and community of the First Nation was inconclusive. In granting a declaratory order the court gave the parties a further two weeks to come to an agreement. In May 2007, no agreement had been reached, and the court gave permission to Platinex to begin drilling. The KI rejected the order of the court and on December 14, 2007, the Chief, council and band administrators were found in contempt of court order for impeding or threatening to impede Platinex and were each sentenced to 6 months imprisonment.<sup>398</sup> On appeal, the sentences were reduced to 2 months, a result Platinex supported.<sup>399</sup> The imprisonment of the Chief and Headmen for steadfastly defending their Treaty hunting rights exemplified the depths of the divide created by the Crown's asserted ownership of the land and Indigenous legal order, in which how the duty of consultation is operating to subjugate Indigenous people.<sup>400</sup>

In addition to implementing Treaty rights, First Nations communities have often requested Canada to conform to international legal standards on free, prior and informed

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<sup>395</sup> *Ibid* at para 111.

<sup>396</sup> *Platinex*, *supra* note 92 at para 171.

<sup>397</sup> *Ibid* at para 170

<sup>398</sup> *Platinex Inc. v Kitchenuhmaykoosib Inninuwig First Nation* 2008 CanLII 11049 (ON SC), on appeal, the sentences were reduced.

<sup>399</sup> *Platinex Inc. v Kitchenuhmaykoosib Inninuwig First Nation*, 2008 ONCA 533.

<sup>400</sup> *Hupacasath*, *supra* note x at para. 72 the court held, "It is important to remember, as the court stated in *Haida*, the Crown's duty is to consult and accommodate. The petitioners do not have a veto. They cannot dictate the outcome.

consent and for Canada to adhere to the United Nations *Declaration on the Rights of Indigenous Peoples*.<sup>401</sup> Canadian law must be in line with the international standards represented in the UN *Declaration*. Implementing the UN *Declaration* in Canada is key to ensure that Indigenous peoples' rights are fully realized and recognizing Aboriginal self-determination, inherent rights, and land tenure including the principle of free, prior and informed consent. The Assembly of First Nations in a joint statement to the Permanent Forum on Indigenous Issues<sup>402</sup> cautions against replacing the established International standard of consent with the lesser standard of consultation (Free Prior and Informed Consultation) and that governments or corporations would continue to be free to act in their own interests and the interests of other powerful sectors of society while ignoring the decision made by Indigenous peoples.<sup>403</sup> AFN has provided a list of recommendations for Canada in respect of FPIC:

1. Urge states and specialized agencies to adopt a standardized interpretation of FPIC consistent with international human rights standards.
2. Highlight the need to address the unequal bargaining power generally existing between state/third party developers and Indigenous peoples, by ensuring that the peoples concerned have the necessary financial, technical and other assistance to fully and effectively participate at all stages. States have a role and responsibility to ensure just and democratic processes, consistent with the principle of sustainable and equitable development.
3. Urge states that are undermining FPIC to uphold their international obligations, so as to ensure full respect and implementation of all Indigenous peoples' rights, including those in Treaties with such peoples. In this context, the UN Declaration on the Rights of Indigenous Peoples is

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<sup>401</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA Res 61/295, UN Doc A/RES61/295 (Sept 13, 2007) (2007) 46 ILM 1013. One hundred and forty four states voted in favour of the UN *Declaration*, while four States (Australia, Canada, New Zealand, and the United States) voted against the UN *Declaration*. Eleven States abstained. In 2009, Australia moved to endorse the UN *Declaration*. In April 2010, New Zealand also indicated their support. On November 12, 2010, Canada issued a Statement of Support endorsing the UN *Declaration*. On December 15, 2010, the United States indicated their support the UN *Declaration*.

<sup>402</sup> The Assembly of First Nations Joint Statement at the Tenth session of the Permanent Forum on Indigenous Issues – Free, prior and informed consent, May 16-27, 2011, New York, NY. < [http://www.afn.ca/index.php/en/national-chief/highlights-from-the-national-chief/permanent-forum-on-indigenous-issues-free-prior-and-informed-consen\\_nc](http://www.afn.ca/index.php/en/national-chief/highlights-from-the-national-chief/permanent-forum-on-indigenous-issues-free-prior-and-informed-consen_nc)>

<sup>403</sup> *Ibid.*

- inseparable from states' obligations under diverse treaties.
4. Urge states to fully respect FPIC, in regard to all customary rights of Indigenous peoples to genetic resources without discrimination. Provisions in the Nagoya Protocol that could serve to dispossess Indigenous peoples of such resources lack validity and require urgent redress.<sup>404</sup>

Consultation is not consent. The principle of FPIC upholds the human rights of Indigenous people and is an expression of the inherent right to self determination. It was also the underpinning of the Treaty First Nations ability to conclude the numbered Treaties with the Crown. However, under the weight of unrecognized rights, failure to implement Treaties, and consultation instead of informed consent, First Nation communities continue to appeal to international venues for remedies.

The duty to consult jurisprudence provides no protection for First Nations that have experienced breaches of the duty to consult in the past, nor breaches that are ongoing, as evidenced by the recent Supreme Court case in *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*.<sup>405</sup> The Supreme Court of Canada determined that the British Columbia Utilities Commission, as a government tribunal, had jurisdiction to consider the scope and nature of the duty of to consult with the Carrier Sekani Tribal Council First Nations in regard to infringements. At issue was the Kenney Dam, built in the 1950's by the BC Government to produce hydro and smelt aluminum, an industrial process which altered the water flow into the Nechako river where the Carrier people fished in since time immemorial. The BC government failed to consult with them when they built the dam and sought approval for the sale of the excess hydro from the dam to another crown corporation.<sup>406</sup> The Supreme Court did not address the ongoing breach occurring with the dam and narrowed the scope of the issue to whether the sale of the excess hydro constituted a fresh breach that adversely impacted the Carrier Sekani rights. The court, in applying *Haida*, confines the duty to consult to adverse impacts flowing from the specific Crown proposal at issue and absent this requirement, suggests that other

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<sup>404</sup> *Ibid.*

<sup>405</sup> *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43.

<sup>406</sup> *Ibid* at para 1.



remedies may be appropriate.<sup>407</sup> By denying a remedy for past or continuing breaches of the duty to consult, the court renders this Constitutional protected Treaty right to be hollow for some. The British Columbia Court of Appeal in *West Moberly*<sup>408</sup> may have departed from the Supreme Court's approach in *Rio Tinto*, indicating that where a causal connection could be established between current Government action and future effects courts can examine cumulative effects, including historic elements, in applying the duty to consult.

Timothy Hoyer in *Honour of the Crown: The Approach to Crown-Aboriginal Reconciliation*,<sup>409</sup> points out the similarities between the duty to consult and accommodate Aboriginal people with the duty to consult the public contained in the *Canadian Environmental Assessment Act*,<sup>410</sup> whose purpose is to ensure that there be opportunities for timely and meaningful participation throughout the environmental assessment process. Critics of the *Canadian Environmental Assessment Act* point out that it has not guaranteed protection of the environment or Aboriginal rights. Despite having a process, Hoyer notes projects are overwhelmingly approved. The Act, in substance, implementation, or both, favors development over sustainability.<sup>411</sup> Hoyer states, "If the environmental assessment process with all of its requirements for consultation and consideration of environmental effects (all of which are subject to judicial review) fails to provide meaningful protection of environmental effects, a similar duty (existing independently of statute) to consult and accommodate Aboriginal peoples cannot ensure that Aboriginal rights are meaningfully protected."<sup>412</sup> Where the CEAA review process is highly regulated, the process for consultation and accommodation is highly discretionary.

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<sup>407</sup> *Ibid* at para 51-54.

<sup>408</sup> *West Moberly First Nation v British Columbia (Chief Inspector Mines)*, 2011 BCCA 247.

<sup>409</sup> Hoyer, *Honour of the Crown*, *supra* note 391.

<sup>410</sup> *Canadian Environmental Assessment Act*, SC 1992, c 37. Covers projects where the Federal Government is the proponent, provides financing or where its approval is required.

<sup>411</sup> Hoyer, "Honour of the Crown", *supra* note 391, citing David R. Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy*, (UBC Press: Vancouver, 2003) at 151, wherein Boyd notes that between 1995-2000, more than 99.9 percent of projects reviewed under the Act were approved.

<sup>412</sup> *Ibid*, *supra* note 391 at 11.

In cases on the duty consult, we see a pattern: an Aboriginal right is asserted, the Crown acknowledges it, if the supporting evidence exists, the project plan may be altered, and ultimately the project goes ahead. The best that can be hoped for is Aboriginal people are able to discuss how the project will infringe their rights and perhaps participate in that infringement. Thus, the duty of consultation means that Aboriginal rights and title do not truly inform Government decisions. As Prof. Christie, in his article, “*A Colonial reading of Recent Jurisprudence: Sparrow, Delgamuukw and Haida Nation*”<sup>413</sup> points out:

The ability to make these sorts of decisions is not threatened under the doctrine of Aboriginal rights, the only impact these rights have on such decisions is in relation to how these decisions are put into operation 'on the ground'. The decision to build a road, for example, might have to be made through consultation with potentially affected Aboriginal rights-holders, and the road itself might have to be constructed in such a way as to 'accommodate' certain of the interests expressed during consultation, its construction might even have to be delayed until treaty arrangements are made. But almost certainly the road will be built.<sup>414</sup>

Prof. Christie further points out that the duty to consult has emerged from a colonial narrative where the judiciary protects the overarching power of the Crown and its visions on Aboriginal, Treaty rights and land title. Specifically, he points out several features of the common law system that do not take full account of Treaty-protected First Nations legal orders: the conceptualization of Aboriginal land interests as 'burdens' on underlying Crown title, Crown Sovereignty, the creation of the fiduciary doctrine and requirement of a specific interest, the transformation of pre-existing rights in one normative system with Aboriginal rights in another normative system; the creation of Aboriginal rights without internal limits, the system for justifying infringement on inherent and constitutionally protected rights. He notes that when the Crown is obligated to consult with an Aboriginal nation, it is not about how its collectivity is seen in relation to land (and rights) but rather how the Crown is obliged to consult about its visions of land use will be implemented. Further, there is never any question in the court's mind that the Crown has complete power to determine what land means, what uses the land will be

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<sup>413</sup> Gordon Christie, “A Colonial Reading” *supra* note 231.

<sup>414</sup> *Ibid* at para 65.

put to and how Aboriginal people will live in relation to both the land and resources. Christie argues that the defining characteristic in the court's decisions leading the Duty to consult, is that it works to push and pull Aboriginal title holders along an assimilative path.<sup>415</sup> On this path, the courts have institutionalized the continuing erosion of Treaty rights by various means, including systematically justifying infringements of Treaty rights.

Each First Nation has the inherent right and responsibility to express their relationship to the land through their own jurisprudence. Indigenous people are asserting their fundamental right to determine what development they wish to pursue, both within their reserves lands and traditional territories. Government and industry, as evidenced in the jurisprudence, have initiatives for development that do not fit within the visions of Indigenous peoples. Indigenous concepts of land tenure and land use view land as more than merely a commercial and economic interest. Differences in the development of land and economic development projects reflect the differences between cultures. First Nations place great importance on collectivist priorities that include the spiritual value in land and protection of the nation from the continued threat of colonial assimilation laws and policies. There must be community participation in economic and environmental projects. Projects cannot be undertaken alone by industry or government. There also must be a consensual basis for agreement and active participation. There must be full social and economic justifications sanctioned by the community and through their leadership. The Treaty relationship, the Crown's fiduciary duty, the Crown's honour, imports a positive duty to protect First Nation jurisdiction by supporting those First Nations who do not want to be forced into consultation processes. The result should not have to be a stark choice between free participation in economic development projects and forced participation which entrenches colonial assertion of western superiority and economic values.

The following chapter provides the avenue for proper consultation of the constitutionally protected Treaty rights. Specifically, a repatriation of Treaty

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<sup>415</sup> *Ibid* at para 43-47.

constitutionalism in Canadian federalism wherein any consultation regarding infringements of treaty rights occurs on a nation-to-nation basis, as the treaty itself was negotiated. Proper consultation requires constitutional reform with constitutional dialogue through constitutional conferences.

## 4.5 CONCLUSION

The historical neglect of the Crown's duty to consult Treaty people have resulted in a century of unilateral land grants, legislation, regulations and agreements by the Crown. The history of unilateral action is directly proportional to the failure of the Crown to recognize and implement the sacred Treaty agreements between the sovereign nations. The Supreme Court, in the duty to consult cases, has definitively held that unilateral Crown action is no longer acceptable nor legal, and set out legal framework which must be respected by the Crown. Unfortunately, the duty to consult framework is premised on a Aboriginal and Treaty rights paradigm that denies Indigenous sovereignty and fails to fully recognize the treaty order and the full legal and constitutional rights of Aboriginal and Treaty First Nations.

The judicial treatment of duty to consult Treaty rights holders was reflected in the various court decisions in *Mikisew*. The Supreme Court provided direction to the Crown on the nature of the Treaty relationship and their legal duty to consult which demonstrated the Crowns unilateral actions toward the Mikisew was destructive to the Treaty relationship. Binnie J.C. stated

The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievance created by the indifference of some government officials to aboriginal peoples concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. And so it is in this case.<sup>416</sup>

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<sup>416</sup> *Mikisew*, *supra* note 5 at para 1.

Treaties are nation-to-nation covenants and there is a legal frame work of Treaty that has never been realized. The Crown undertook a positive duty to protect Aboriginal lands and peoples from the impacts of the European settlement and the laws. Included in that duty is the protection and fulfillment of inherent rights and Treaty implementation. Treaties are spiritual and living covenants. Treaty sovereignty underlies treaties and has never been extinguished nor has it authorized modification or infringements. The Treaties are sacred promises made by two sovereigns, *Kihci-Asotamâtowin*, that cannot be changed or altered without mutual consent. Canada possesses the framework to engage in proper consultation on the numbered Treaties through the inclusion of Treaty Constitutionalism.

**CHAPTER 5**  
**TREATY CONSTITUTIONALISM WITH CONSTITUTIONAL CONFERENCES**  
**AS MODELS OF CONSULTATION**

*“We don’t want to scare people with our terminology. No one is scared in this country by the fact that Ontario and Manitoba can make laws in education...They are sovereign in their area of jurisdiction. We, likewise, want to have clear powers over our territories.”*

~George Erasmus, Former Chief of the Assembly of First Nations

**5.0 INTRODUCTION**

Indigenous legal and Constitutional orders are the foundation for the consensual nation-to-nation agreements made in Treaty to share the land in peaceful coexistence with European people and their descendants. Centuries of colonial policy, legislation and case law have denied Treaty governance and rights. The judiciary has played an integral role in maintaining a colonial paradigm by articulating the duty of consultation and accommodation and the doctrines of the honour of the Crown and reconciliation that do not incorporate Indigenous legal and Constitutional orders. Sympathetic and Indigenous-friendly ruminations from the court and Crown have failed to effect the change required to repatriate Indigenous nations to their rightful place in the Canadian federation. This chapter discusses the urgent requirement for Constitutional reform through a shared Constitution. Constitutional reform can achieve a bi-lateral federation envisioned by Treaty through the inclusion of Treaty Constitutionalism. The governments will, then, be able to engage in proper and just consultation on Treaty rights through Constitutional dialogue by means of Constitutional conferences.

Also examined in this chapter is the court’s precept of reconciliation. Much like the honour of the Crown, the doctrine of reconciliation has been used by the courts and governments to describe the relationship between Indigenous people and the Crown. The Supreme Court has indicated that reconciliation is the underlying purpose behind s. 35 of the *Constitution Act, 1982*. However the court has used the concept of reconciliation as a

guise to further the colonial agenda by undermining Indigenous sovereignty and broadening of legislative infringements of Indigenous rights. Both the courts' and Crown's notions of reconciliation do not go far enough to effectively bring a true reconciliation to address the ills of centuries of colonialism and the denial of Indigenous legal orders. True reconciliation will only occur through a complete paradigm shift through the inclusion of Indigenous legal and Constitutional orders in a tripartite federation.

## **5.1 RESTORATION OF TREATY CONSTITUTIONALISM**

The history of the Treaty relationship is marked by colonialism, domination and failed treaty implementation. Canadian Parliament, politicians, courts and institutions, and some lawyers wilfully deny the rights of Treaty and refuse to acknowledge the authority of First Nations, thereby unjustly conferring power, wealth and privilege onto themselves. The denial of Treaty First Nations' legal orders and of Treaty Constitutionalism deprives treaty First Nations of their human right to self-determination and maintains First Nations in poverty. In the denial of Treaty, the colonial goals of oppression and subjugation became the objective instead of honouring the legal agreements signed. The British system of government was unilaterally imposed by Canada on the Indigenous nations which made no room for Indigenous legal orders.<sup>417</sup>

In fact, many Canadians see Treaty rights as a handout. Canada continues to deny Treaties and even the existence and preoccupation of Canada by Treaty Nations. This fact was recently made clear in the 2013 Throne Speech, where the Prime Minister's Office, through the Governor General, went so far as to say that "no one was here" in Canada when the brave pioneers arrived.<sup>418</sup> The Governor General stated,

This is Canada's moment, together we will seize it. And as we do, we draw inspiration from our founders, leaders of courage and audacity. Nearly 150 years

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<sup>417</sup> See RCAP *Final Report* Vol 1, supra note 42.

<sup>418</sup> 2013 Canadian Federal Throne Speech, <[http://www.speech.gc.ca/sites/sft/files/SFT-EN\\_2013\\_c.pdf](http://www.speech.gc.ca/sites/sft/files/SFT-EN_2013_c.pdf)>

ago, they looked beyond narrow self-interest. They faced down incredible challenges - geographic, military, and economic. They were undaunted. They dared to seize the moment that history offered. Pioneers, then few in number, reached across a vast continent. They forged an independent country where none would have otherwise existed.<sup>419</sup>

The existence of Treaty and the obligations to implement them were not mentioned. What has remained consistent is that regardless of the political party in power, all have consistently failed to honour the Treaties. Successive government failure to take concrete action to alleviate the disparity has not gone unnoticed by international human rights forums.<sup>420</sup>

The brute facts reveal that any efforts made by the Crown and the judiciary have been ineffective to implement the Treaty obligations owed by the Crown to Treaty nations. The courts have proven unable to extract themselves from a colonial paradigm of protector of the state as evidenced in the common law Aboriginal and treaty rights paradigm, the duty to consult jurisprudence, and the judicial doctrines of the honour of the Crown and reconciliation. The courts' decisions are premised on the denial of

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<sup>419</sup> *Ibid.*

<sup>420</sup> "Top United Nations expert James Anaya urges Nations to Honour Treaties with Indigenous Peoples, by Michael Woods, Post Media News, Canada.com, August 9, 2013, <[www.canada.com/story\\_print.html?id=8770753&sponsor=hp-storytoolbox](http://www.canada.com/story_print.html?id=8770753&sponsor=hp-storytoolbox)>; Montreal Gazette, "UN slams Canada for First Nations treatment" by Lee Berthiaume, Post media News, Feb 22, 2012, Canada's international reputation came under fire in Geneva on Wednesday as a UN expert panel delivered scathing criticisms over the government's treatment of First Nations and recent changes to the country's immigration system. Members on the Committee on the Elimination of Racial Discrimination, all of them human-rights experts from around the world, questioned why headway has not been made in resolving the disparities between First Nations communities and the rest of the country. "This problem should not continue the same way as it has in the past," said Nouredine Amir, vice-chairman of the Committee on the Elimination of Racial Discrimination. "How long will this be ongoing?" The treatment of natives jumped back onto the federal political agenda after the Red Cross delivered humanitarian aid to the First Nations community of Attawapiskat in northern Ontario late last year. Since then, opposition parties and aboriginal groups have called on the Conservative government to provide more funding for education, better infrastructure and a move toward self-determination. There are also concerns that the government's omnibus crime bill will have a disproportionate impact on natives. In response, the government says it will focus on bringing *job training* and other actions to ensure Canada's more than one million aboriginal people can compete in the workplace and enjoy the same economic benefits and prosperity as other Canadians. <<http://www.canada.com/news/slams+Canada+First+Nations+treatment/6193201/story.html#ixzz1nE3S9ml>>



Indigenous legal, Constitutional and Treaty orders. The court, as a colonial Crown institution, operates to protect the sovereignty of the Crown, despite musings to the contrary, which are, at best, sympathetic to Indigenous orders. It is clear that the court alone is not responsible, but they have played a central role in maintaining a colonial state.

What is required is a new Canada created on new Constitutional orders with the Treaties as the founding principle. From the Treaty arrangement Canadian federalism emerged. Canadian federalism should have been Treaty Constitutionalism. Treaty Constitutionalism requires institutional reform of governmental bodies that are consistent with Constitutional supremacy, the full embodiment of the honour of the Crown. Unless Indigenous legal and Constitutional orders are integrated into federalism there will continue to be structural inequality. Legal and academic commentators have also advocated for this type of approach.<sup>421</sup>

## 5.2 TREATY CONSTITUTIONALISM AS RECONCILIATION

The concept of reconciliation has increasingly been used by the courts and governments to characterize a political process between Aboriginal rights and the

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<sup>421</sup> J. Borrows, "Constitutional Law From a First Nations Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C.L. Rev. 1; B. Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1996) 34 Osgoode Hall L.J. 101; B. Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1990-1991) 36 McGill L.J. 308; P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1990-1991) 36 McGill L.J. 382; *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001); M. Hudson, "Reconciling Diversity with Unity-Canadian Federalism in the 21<sup>st</sup> Century", presentation to Canadian Bar Association Canadian Legal Conference, August 14-16, 2005, Vancouver. See the work of political scientists like K.L. Ladner, "Treaty Federalism: An Indigenous Vision of Canadian Federalisms" in F. Rocher and M. Smith, eds. *New Trends in Canadian Federalism*, 2d ed. (Peterborough: Broadview Press, 2003) 167. J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995); S. LaSelva, *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood* (Montreal: McGill Queen's University Press, 1996) M. Hanvelt and M. Papillon, "Parallel or Embedded? Aboriginal Self-government and the Changing Nature of Citizenship in Canada" in G. Kernerman and P. Resnick, eds., *Insiders and Outsiders: Alan Cairns and the Reshaping of Canadian Citizenship* (Vancouver: UBC Press, 2005) 242 at 248-249; I. Peach and M. Rasmussen, "Federalism and the First Nations: Making Space for First Nations' Self-determination in the Federal Inherent Right Policy" online [http://www.cst.ed.ac.uk/2005conference/papers/Peach\\_Rasmussen\\_paper.pdf](http://www.cst.ed.ac.uk/2005conference/papers/Peach_Rasmussen_paper.pdf) (last accessed March 2005).

assertion of Crown sovereignty. It's a word that connotes a bringing back together of two groups after separation or dispute. The Supreme Court has held that the underlying objective of s. 35(1) in the Constitution is reconciliation, but the court has used the concept of reconciliation in a contradictory manner. The descriptions and exercises of reconciliation have taken many forms, including: federal power to federal legislative duty,<sup>422</sup> Aboriginal rights to the larger society,<sup>423</sup> prior Aboriginal occupancy to the assertion of Crown Sovereignty,<sup>424</sup> Aboriginal and non-Aboriginal perspectives<sup>425</sup> and the honour of the crown.<sup>426</sup> Reconciliation has been used to facilitate and justify a proliferation of legislative infringements on Aboriginal rights and then, on the other hand, to also protect those rights through the honour of the Crown precept. Throughout it all, what is clear is that reconciliation between Indigenous nations and the Crown cannot be achieved through Canadian courts on the current course.

The sacred and inviolable Treaties represent a true reconciliation between the Crown and Indigenous nations. They were entered into through an exclusive nation-to-nation relationship that solidified peaceful coexistence and a shared, consensual union. The parties agreed to share the same land and resources as independent nations. Indigenous nations maintained all legal rights and jurisdiction within their territories and those exclusive rights that have not yet been properly reconciled with the Crown through a shared Constitutional arrangement. The court's articulation of reconciliation falls short of demanding formal reconciliation of Indigenous legal orders and their sovereignty.

An examination of the jurisprudence reveals that the courts have demonstrated that they are unable to be effective in reaching a true reconciliation, one that is defined by inclusion of a Indigenous conception of reconciliation. Courts have been unable to provide the possibility of just reconciliation of Indigenous sovereignty as the court itself

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<sup>422</sup> *Sparrow*, *supra* note 178 at 45.

<sup>423</sup> *Van der Peet*, *supra* note 47 at 52.

<sup>424</sup> *Delgamuukw*, *supra* note 39 at para 186, *Van der Peet*, *supra* note 47 at para 31

<sup>425</sup> *Van der Peet*, *supra* note 47 at para 49, 50.

<sup>426</sup> *Haida*, *supra* note 3 at para 17.

is unable to remove itself from a colonial paradigm and protector of the overarching colonial power of the Crown.

Legal scholars critical of the use and misuse of the concept of reconciliation have described it as a 'doctrine plucked from thin air'<sup>427</sup> as well as being a 'front' for assimilation. Much like other legal constructions in the Aboriginal rights discourse, reconciliation has been used as an excuse to infringe Indigenous rights and is a part of the ongoing colonial narrative on Indigenous people by Crown and courts. John Borrows in *"Domesticating Doctrines: Aboriginal Peoples after the Royal Commission"* puts it aptly,

Courts have read Aboriginal rights to lands and resources as requiring a reconciliation that asks much more of Aboriginal peoples than it does of Canadians. Reconciliation should not be a front for assimilation. Reconciliation should be embraced as an approach to Aboriginal-Canadian relations that also requires Canada to accede in many areas. Yet both legislatures and courts have been pursuing a course that, by and large, asks change only of Aboriginal peoples. Canadian institutions have been employing domesticating doctrines in their response to the Royal Commission on Aboriginal Peoples. This approach hinders Aboriginal choice in the development of their lands and resources, rather than enhancing it.<sup>428</sup>

### ***5.2.1 The Reconciliation of Federal Power & Duties: Sparrow***

The concept of reconciliation has been used by the courts to reconcile Federal power and duties with Constitutionally protected Aboriginal rights. In 1990, the courts, in justifying the Crown's legislative infringements on Aboriginal rights in *Sparrow*, had introduced the concept of Constitutional reconciliation. In particular, the court stated section 35 rights are not absolute and federal legislative power must be reconciled with its fiduciary duty to Aboriginal people:

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<sup>427</sup> Russell Lawrence Barsh, James Youngblood Henderson, "Aboriginal Rights, Treaty Rights, and Human Rights: Indian Tribes and Constitutional Renewal" (1982) 17 J Can Studies Rev 55 at 998, see also Russell Barsh and James Sakej Henderson, "The Supreme Court's *Van der Peet* Trilogy: Native Imperialism and Ropes of Sand" (1997) 42 McGill L J 993.

<sup>428</sup> John Borrows, "Domesticating Doctrines: Aboriginal Peoples after the Royal Commission" (2001) 46 McGill L J 615 (QL) at para 64.

There is no explicit language in the provision [s. 35(1)] that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words “recognition and affirmation” incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.<sup>429</sup>

The court’s conception of reconciliation in *Sparrow* maintains the Crown’s legislative power over Aboriginal people of Canada notwithstanding the existence of Indigenous orders or Treaty agreements that require consent to any changes in their rights. In the context of Treaty obligations, there are no provisions in Treaty that agreed for legislative authority over Indigenous Treaty nations.

### ***5.2.2 Reconciliation of Indigenous People to Crown Sovereignty: Van der Peet Trilogy***

The court’s theory on reconciliation was then reinterpreted in *Van der Peet*, *Gladstone*, and *Smokehouse*. In defining the scope of Aboriginal rights protected by s. 35(1), the court moved from the need to reconcile the Constitutional recognition of Aboriginal rights with federal legislative power to reconciling the rights of Aboriginal people with the Crown’s sovereignty. The *Gladstone* court considered the kinds of legislative objectives which they considered to be sufficiently compelling and substantial to justify the infringement of Aboriginal rights. After referring to *Van der Peet*, Lamer C.J.C. stated,

In the context of the objectives which can be said to be compelling and substantial under the first branch of the *Sparrow* justification test, the import of these purposes is that their objectives which can be said to be compelling and substantial will be those directed at either the recognition of the prior occupation of North America by aboriginal peoples or – and at the level of justification it is this purpose which may well be most relevant — at the reconciliation of aboriginal prior occupation with the assertion of sovereignty by the Crown.<sup>430</sup>

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<sup>429</sup> *Sparrow*, *supra* note 178 at 1113-1115.

<sup>430</sup> *Gladstone*, *supra* note 188 at para 72.

Later in the same decision the court's revision of reconciliation reframed the need for reconciliation to pursue compelling and substantive objectives that are important to the boarder community as a whole,

Because ... distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are a part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.<sup>431</sup>

The court also stated both the definition of the Aboriginal rights and the reconciliation of prior occupation of 'Canadian territory' by Aboriginal people with the assertion of Crown sovereignty must "take into account the Aboriginal perspective ... in terms which are cognizable to the non-aboriginal legal system."<sup>432</sup> The *Van der Peet* decision is rife with colonial objectives in expanding the justifiable infringements coupled with the requirement of Indigenous legal orders being read down and altered to fit into the Canadian common law system.

In *Van der Peet*, McLachlin J., for the minority court, was not in complete agreement to the majority's interpretation of s. 35. The minority court noted that "s. 35(1) recognizes not only prior aboriginal occupation, but also a prior legal regime giving rise to aboriginal rights which persist, absent extinguishment."<sup>433</sup> Reconciliation, the court held, occurs when the Aboriginal rights claims are reconciled with European settlement and sovereignty "in a way that provides the basis for a just and lasting settlement of the

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<sup>431</sup> *Ibid* at para 73.

<sup>432</sup> *Ibid* at para 49.

<sup>433</sup> *Ibid* at para 230.

claims and consistent with the high standard which the law imposes on the Crown in its dealings with aboriginal peoples.”<sup>434</sup> The minority stated,

My third observation is that the proposed departure from the principle of justification elaborated in *Sparrow* is unnecessary to provide the “reconciliation” of aboriginal and non-aboriginal interests which is said to require it. The Chief Justice correctly identifies reconciliation between aboriginal and non-aboriginal communities as a goal of fundamental importance. The desire for reconciliation, in many cases long overdue, lay behind the adoption of s. 35(1) of the *Constitution Act, 1982*. As *Sparrow* recognized, one of the two fundamental purposes of s. 35(1) was the achievement of a just and lasting settlement of aboriginal claims. The Chief Justice also correctly notes that such a settlement must be founded on reconciliation of aboriginal rights with the larger non-aboriginal culture in which they must, of necessity, find their exercise .... The question is how this reconciliation of the different legal cultures of aboriginal and non-aboriginal peoples is to be accomplished. More particularly, does the goal of reconciliation of aboriginal and non-aboriginal interests require that we permit the Crown to require a judicially authorized transfer of the aboriginal right to non-aboriginals without the consent of the aboriginal people, without treaty, and without compensation? I cannot think it does.<sup>435</sup>

The minority’s understanding of reconciliation was correct in finding, first, the departure from the justification in *Sparrow* of federal power and duties, and second, the *Van der Peet* reconciliation of Aboriginal people to the broader community, failed to give proper accord to the Constitutional principles. The minority also noted that Aboriginal and non-Aboriginal perspectives have historically been reconciled through Treaties and that negotiation of settlements is the process of reconciliation. The court went on to state that until the traditional means by which aboriginal and non-aboriginal legal perspectives may be reconciled have been exhausted, the courts should be careful not to suggest more radical methods of reconciliation possessing the potential to erode aboriginal rights seriously.<sup>436</sup>

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<sup>434</sup> *Ibid.*

<sup>435</sup> *Ibid* at para 310.

<sup>436</sup> *Ibid* at para 313, McLachlin, CJ held, “It is for the Aboriginal peoples and other peoples of Canada to work out a just accommodation of the recognized aboriginal rights. This process definition of the rights guaranteed by s. 35(1) followed by negotiated settlements – is the means envisaged in *Sparrow*, as I perceive it, for reconciling the aboriginal and non-aboriginal perspectives. It has not as yet been tried in the case of the Sto:lo. A century and one-half after European settlement, the Crown has yet to conclude a treaty with them.”

As can be seen, the court's theory on reconciliation shifted toward a idea of Constitutional priority of the democracy of Canada. The *Van der Peet* majority linked reconciliation and the justification of infringements test which subjects breaches of Aboriginal rights to a Charter s. 1 justification analysis. The minority points out this is contrary to the Constitution and perhaps even contrary to the objectives behind the entrenchment of Sec. 35(1). In the end, however, what remains is that the interests of the broader Canadian society trumps the Constitutionally entrenched rights of Indigenous peoples. The universal definition of reconciliation as the restoration of harmony, after centuries of historical injustices toward Indigenous peoples, becomes perverted and misused by the needs of the colonizing Crown. This articulation of reconciliation of the entrenchment of s. 35(1) is unacceptable. The purpose of reconciliation, as stated by *Sparrow*, is to remediate the conflicts that have resulted from the ongoing colonial project by the Crown. The courts deem that Indigenous nations are better at bearing the brunt of infringement than Canadians are at tolerating the recognition and implementation of Indigenous rights.

### ***5.2.3 Reconciliation of Aboriginal Rights by Unlimited Infringement: Delgamuukw***

In keeping with the court's jurisprudential course of denying Indigenous rights that arise from Indigenous legal orders, the *Delgamuukw* court affirmed and applied the *Gladstone* justification test to infringements of Aboriginal title, expanding the list of justifiable infringements of Aboriginal title,

In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of those objectives can be traced to the reconciliation of the prior occupation of North America by Aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that "distinctive Aboriginal societies exist within, and are a part of, a broader social, political and economic community" (at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of

objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.<sup>437</sup>

#### **5.2.4 Reconciliation of Aboriginal Rights through the Duty to Consult: Haida**

The Supreme Court in *Haida* returns to a vision of reconciliation that focuses on reconciliation through negotiated settlements of Indigenous rights and sovereignty claims. The court outlined that the Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35. The court noted that s. 35 represents a promise of rights recognition and, as stated in *Badger*, that it is always assumed that the Crown intends to fulfil its promises. The court held that honourable negotiation is the means to achieve the reconciliation of rights recognition and claim of sovereignty. The court stated that "It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate."<sup>438</sup> The court describes reconciliation,

The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and de facto control of land and resources that were formerly in the control of that people. As stated in *Mitchell v MNR*, 2001 SCC 33 (CanLII), [2001] 1 SCR 911, 2001 SCC 33, at para. 9, "[w]ith this assertion [sovereignty] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation."<sup>439</sup>

The passage makes clear that reconciliation is an ongoing process beyond claims resolution as part of a Constitutional duty. Reconciliation is properly seen as a remedial legal duty not a doorway to unlimited infringement of Aboriginal and Treaty rights. The court reaffirmed the danger in redefining reconciliation in a meaningless way,

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<sup>437</sup> *Delgamuukw*, *supra* note 39 at para 165.

<sup>438</sup> *Haida*, *supra* note 3 at para 20.

<sup>439</sup> *Ibid* at para 32.



To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the “meaningful content” mandated by the “solemn commitment” made by the Crown in recognizing and affirming Aboriginal rights and title: *Sparrow*, *supra*, at p. 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.<sup>440</sup>

The decision in *Haida* is consistent with the minority in *Van der Peet*, wherein reconciliation allows the Crown to require courts to transfer an Indigenous right to non-Indigenous Canadians without the consent, without a treaty and without compensation of Indigenous people. The *Haida* court returns the focal point to a theory of reconciliation which acknowledges the historical injustices suffered by Aboriginal peoples and places limits on Crown’s ability to modify the right in the pre-proof stage.

#### **5.2.5 Reconciliation as Managing the Treaty Constitutionalism: *Mikisew***

In *Mikisew*, the court emphasized the importance of reconciliation by stating the fundamental objective of the modern law of Aboriginal and Treaty rights is the reconciliation of Aboriginal peoples and non-Aboriginal peoples and their respective claims, interests and ambitions.<sup>441</sup> The court recognized the relationship has a long history of grievances and misunderstandings created by the indifference of government officials to Aboriginal people’s concerns, and the disrespect inherent in that indifference. The result undermined the process of reconciliation.<sup>442</sup> The court has reaffirmed that where Treaty exists, there is an ongoing duty of consultation and reconciliation in keeping with the honour of the Crown. Consultation is a means of reconciliation that is demanded by s. 35 to manage the treaty relationship existing in Canada.

Unfortunately the Treaty jurisprudence is flawed in the first instance by altering and infringing the Treaty without the consent of the Indigenous treaty party. Legislative infringement is in direct violation of the Treaty as there were no lawful transfer of power

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<sup>440</sup> *Ibid* at para 33.

<sup>441</sup> *Mikisew*, *supra* note at para 1.

<sup>442</sup> *Ibid*.

nor a delegation of any Indigenous orders to the Crown through the Treaty process. The Indigenous Treaty people did not agree to enveloping their legal orders into the Canadian Constitutional order through Treaty or otherwise.

Brian Slattery in his article "*Principles of Recognition and Reconciliation*," states that reconciliation must strike a balance between the need to remedy past injustices and the need to accommodate contemporary interests.<sup>443</sup> Indeed, Sec. 35 and reconciliation require the Crown to take positive steps to identify Indigenous legal orders by the standard, content, participation and consent of the Indigenous peoples concerned. Slattery describes the basic principles of recognition and reconciliation:

1. They should acknowledge the historical reality that "when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries," as Judson J. observed in the Calder case. They should not draw arbitrary distinctions between "settled", "nomadic", and "semi-nomadic" peoples but accept that all of the Indigenous peoples in Canada had historical rights to their ancestral homelands — the lands from which they drew their material livelihood, social identity, and spiritual nourishment — regardless of whether they had developed conceptions of "ownership," "property," of "exclusivity," and without forcing their practices into conceptual boxes derived from English or French law;
2. They should take account of the long history of relations between Indigenous peoples and the British Crown, and the body of inter-societal law that emerged from those relations;
3. They should draw inspiration from fundamental principles of international law and justice, principles that are truly universal, and not grounded simply in rules that European imperial powers formulated to suit their own convenience, such as the supposed "principle of discovery";
4. They should envisage the continuing operation of customary law within the Indigenous group concerned. At the same time, they should explain the way in which the collective title of an Indigenous group relates to the titles of other Indigenous groups and to rights held under the general land system.<sup>444</sup>

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<sup>443</sup> Brian Slattery "*The Metamorphosis of Aboriginal Title*" (2006) 85 Can Bar Rev 255. "Principles of Recognition and Reconciliation" at 283.

<sup>444</sup> *Ibid* at 283-284.

Indigenous legal activists are clear that simply Indigenizing current Canadian institutions fails to go far enough. There needs to be a gargantuan Constitutional paradigm shift in the highest order. Indigenous legal orders and their Constitutional orders need to be accorded an equal place in the creation of a new Canadian federation. Canada itself needs to be recreated with the inclusion of Indigenous legal and Constitutional orders. The colonial legal theories, principles and tests in Canadian law were created are designed to further the goals of a colonizing state. For Canada to advance to a nation-to-nation post colonial state, Indigenous people must occupy an equal Constitutional position. This can only be accomplished by the Crown placing Indigenous legal and Constitutional orders back into the legal position occupied by them as nations, in the same state they were in 500 years ago, that being, organized societies with existing legal and Constitutional orders operating well before the arrival of the European colonist.

The courts have a broad discretion to help make a paradigm shift in the context of their Constitutional obligations. However the court has proved it is ill-equipped to effect a reconciliation of competing interests. Cogent evidence are the legal tests required to establish Indigenous rights, Treaty rights and title, ignoring contemporary evolution of rights, denying Indigenous sovereignty and denying the nation-to-nation agreements that were made in Treaty. The court has demonstrated that it is a colonial institution that protects the sovereignty of the Crown, despite ruminations to the contrary, the outcome will always result in the undercutting of Indigenous rights. Like the internal competing interests and priority of self preservation of the Crown, the courts, as an extension of the Federal Crown, inherently protect its overarching power. The courts have played an integral role in maintaining a colonial paradigm and its claim of reconciliation of Indigenous people to Crown sovereignty sanctions colonization. The theory of reconciliation and the duty to consult fit neatly within that process. True reconciliation can only be effective at a Constitutional level. The Court's role is one step in the process of reconciliation, but as can be seen from the jurisprudence, it cannot completely protect the integrity of Indigenous rights as it cannot even see them.

Indigenous nations never surrendered their sovereignty nor consented to its disappearance. Any rationale used by the courts or the Crown to support that assertion is simply not credible. Indigenous legal orders, laws and jurisdiction form the basis of Canada's existence. The courts have framed reconciliation in a manner that does not address the damaging and ongoing problem of colonization. Political and institutional decolonization and reconciliation is required from the top down. The current interpretation of the reconciliation is demonstrative of the approach in which the Supreme Court , in effect, denies Indigenous rights. The opportunity to re-establish Indigenous legal and Constitutional orders is not yet comprehended.

The court's conception of reconciliation transformed the concept from a 'bringing back together' to a ruse for a broad expansion of legislative infringements on Aboriginal rights and the maintenance of the colonial project of dispossession and subjugation. Colonialism marks both the past and current relationship between Indigenous nations and the Crown. Any discussion of reconciliation will be futile unless and until it is premised on the full recognition of Indigenous rights, legal and Constitutional orders. Any discussion on reconciliation also must be premised on the nation-to-nation relationship that permitted European settlement in Canada. In the end, any discussion on reconciliation must include reaffirmation and repatriation of Indigenous orders through Treaty federalism and institutional decolonization.

Reconciliation through the Treaty process means both the Indigenous Constitutional order and imperial Constitutional orders have been reconciled. Sec. 35 *Constitution Act, 1982*, can be interpreted to reconcile these orders and place them within Constitutional supremacy. In essence, treaty federalism means Constitutional pluralism. It is a process that honours the original spirit and intent of the Treaties, rather than the colonial interpretations provided by the courts and Crown that denies the consensual foundation of Treaty. Treaty did not alter the original rights, laws and jurisdictions unless agreed upon by the parties themselves. The Royal Commission on Aboriginal People concluded that the Canadian Constitution has evolved from the Treaty order and Treaty Constitutionalism when it held,

..over time and by a variety of methods, Aboriginal people became part of the emerging federation of Canada while retaining their rights to their laws, lands, political structures and internal autonomy as a matter of Canadian common law. ... the current constitution of Canada has evolved in part from the original treaties and other relations that First Peoples held with the Crown and the rights that flow from those relations. The treaties form a fundamental part of the constitution and for many Aboriginal peoples, play a role similar to that played by the *Constitution Act, 1867* in relation to the provinces. The terms of the Canadian federation are found not only in formal constitutional documents governing relations between the federal and provincial governments but also in treaties and other instruments establishing the basic links between Aboriginal peoples and the Crown<sup>445</sup>

In essence, Treaty Constitutionalism, treaty federalism is a part of the framework of the Canadian Constitution. As well Sakej Henderson, Marjorie Benson, and Isobel Findlay in *Aboriginal Tenure in the Constitution of Canada*, argue that “the spirit and the intent of s. 35(1), then, should be interpreted as ‘recognizing and affirming’ Aboriginal legal orders, laws and jurisdictions unfolded through Aboriginal and treaty rights.”<sup>446</sup> These rights are Constitutionally vested and protected by the supremacy clause pursuant to s. 52(1) *Constitution Act 1982*, and from abrogation of derogation by individual rights and freedoms in s. 25 of the *Charter of Rights and Freedoms*. Thus Indigenous governments will have the ability to exist parallel to federal and provincial governments, exercising those jurisdictions afforded by their Constitutional order and treaty relationship and as recognized and affirmed within section 35 of the Canadian Constitution while federal and provincial governments exercise those jurisdictions afforded by their Constitutional order under s. 91, 92 and 93.<sup>447</sup>

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<sup>445</sup> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission, Vol. 2*, (Ottawa: Canada Communications Group, 1996), 193-194 [RCAP, *Final Report* Vol. 2]. Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: Canada Communications Group, 1993) [RCAP, *Partners*] at 193-194.

<sup>446</sup> James Sákéj Henderson, Marjorie Benson, and Isobel Findlay, *Aboriginal Tenure in the Constitution of Canada* (Toronto: Carswell, 2000) [Henderson, *Aboriginal Tenure*].

<sup>447</sup> Kiera Ladner, “(RE)creating Good Governance Creating Honourable Governance: Renewing Indigenous Constitutional Orders”, Paper presented at the Annual conference of the Canadian Political Science Association, Ottawa May 27-29, 2009 at 10.

Subsequently, Constitutional reconciliation, as an Constitutional interpretive principle, can provide both the court, and the governments with a framework to implement treaty Constitutionalism. It holds potential, however, only if we can escape the colonial mentality which upholds the sovereignty of the Crown and denies Indigenous nations the same. As Justice Binnie in *Mitchell* noted, “The constitutional objective is reconciliation not mutual isolation...Aboriginal peoples do not stand in opposition to, nor are they subjugated by, Canadian sovereignty. They are a part of it.”<sup>448</sup>

### **5.3 THE CONVERGENCE OF THE TREATY ORDER THROUGH TREATY CONSTITUTIONALISM**

Shared rule or a bi-lateral federation has been described as Treaty Federalism<sup>449</sup> or Treaty Constitutionalism. Treaty Constitutionalism restores the original position of Indigenous people, possessing their own legal, Constitutional and Treaty orders and existing side by side with the Canadian Constitution. Treaties constitute the original Constitutional order. They are the foundation of Canada and created shared responsibilities while preserving Indigenous legal and Constitutional orders.

The goal of restoration of Treaty Constitutionalism has been identified by legal scholars and royal commissions alike. The final report on the *Royal Commission on Aboriginal People* came to same conclusion by confirming that Indigenous peoples are equal partners in Canadian federalism,

We believe Aboriginal people must be recognized as partners in the complex arrangements that make up Canada. Indeed we hold that Aboriginal Governments are one of three orders of government in Canada- Federal, Provincial/Territorial and Aboriginal. The three orders are autonomous within their own spheres of jurisdiction, thus sharing the sovereignty of Canada as a whole. Aboriginal governments are not like municipal governments, which exercise powers delegated from provincial or territorial governments. Shared sovereignty is an important feature of Canadian federalism. It permitted the early partnership

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<sup>448</sup> *Mitchell v MNR*, 2001 SCC 33, [2001] 1 SCR 911 (SCC) at para 133 and 135.

<sup>449</sup> Henderson, “Treaty Federalism”, *supra* note 24.

between Aboriginal and non-Aboriginal people, and later it permitted the union of provinces that became Canada.<sup>450</sup>

Other legal scholars have also envisioned Treaty Constitutionalism. Michael Hudson, in *"Reconciling Diversity with Unity, Canadian Federalism in the 21st Century,"* has argued that true reconciliation requires that Canadians of all origins accept that Aboriginal and non-Aboriginal citizens share the country and its institutions. This reality must then be reflected in Canada's Constitutional order. Such a shared Constitutional order must reflect a shared sovereignty between Aboriginal and non-Aboriginal Canadians."<sup>451</sup> Hudson posits that the architecture for shared sovereignty is in place and what is required is a fresh examination of the Constitution. Kiera Ladner has been very helpful in *"Visions of Neo-Colonialism, Renewing the Relationship with Aboriginal People,"* where she notes that Treaty federalism accepts that Constitutional law, the terms of the nation-to-nation agreements established in the *Royal Proclamation*, the Treaties, and early agreements demonstrate that Aboriginal people were already 'partners in Confederation.'<sup>452</sup>

Similarly, Henderson in *"Empowering Treaty Federalism,"* argues that treaty federalism means Treaty First Nations' free association in a new federalism will enhance Canadian democracy principles:

My suggestion is that the Treaty First Nations should merge treaty federalism with provincial federalism at both the federal and provincial levels. Federalism and the British idea of free association are standards that most Canadians share. These standards are related to human needs and rights and are evidenced in the treaties and the constitutional Acts. Also, these standards inform the context of self-determination as described in the UN *Human Rights Covenants*. Under the authority of maintaining peace and good order, the Treaty First Nations should send Treaty Delegates to Parliament and the provincial legislative assemblies which have intruded on their constitutional rights. Treaty First Nations should require a free association with federal and provincial governments based on the principles of political equality, cultural integrity and economic opportunity. It will

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<sup>450</sup> RCAP *Final Report* Vol. 2, *supra* note 445 at 168.

<sup>451</sup> Michael Hudson, "Reconciling Diversity with Unity, Canadian Federalism in the 21st Century," Paper presented to the Canadian Bar Association, August 14-16th, 2005, Vancouver, B.C. at 2.

<sup>452</sup> Kiera Ladner, "Visions of Neo-Colonialism? Renewing the Relationship with Aboriginal Peoples" (2001) 21 *Canadian Journal of Native Studies* 105 at 127.

be a new partnership in a revitalized federalism and an extraordinary democracy.<sup>453</sup>

Each agreement comprises a central treaty and subsequent ratification treaties. Together these relationships are often called treaty federalism. Treaty federalism was the original Aboriginal prerogative federation with Great Britain and was an indispensable step that had to occur before the spirit and intent of treaty federalism was recorded in Treaty. Treaty federalism is concerned with:

- (1) protection of inherent Aboriginal rights;
- (2) distribution of shared jurisdictions;
- (3) territorial management;
- (4) human liberties and rights; and
- (5) treaty delegations.<sup>454</sup>

Henderson indicates that these five categories in the treaties illustrate the process of Aboriginal autonomy and choice in pursuing their own economic, social and cultural development. Aboriginal self-determination is affirmed by the first principle of the rule of law in the United Kingdom – that all peoples, despite race or ethnicity, are to be secure in what the Crown has recognized as their liberties and entitlements. He states that by any normal rule of law and by s. 35(1) of the *Constitution Act, 1982*, each Aboriginal nation and the Crown is bound only by what it has agreed to in the Treaties. They are not bound to unwritten customary law, to written Constitutional norms or to the domestic law of the other party. The Treaty delegations to the Crown established the limits of Parliament and of the legislative assemblies. Additionally, the promises and terms of the Treaties created a fiduciary duty in the Crown to protect the right of Aboriginal self-determination.<sup>455</sup>

Further, Henderson argues that Treaty federalism needs to be consolidated with provincial federalism into a shared rule in Canada. He explains that Provincial federalism is a derivative jurisdiction established by the First Nations' treaties and was constructed

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<sup>453</sup> Henderson, 'Treaty Federalism', *supra* note 24 at 326.

<sup>454</sup> *Ibid* at 251.

<sup>455</sup> *Ibid* at 269.



not on constitutional legal rules but on English political conventions.<sup>456</sup> He explains that in Treaty federalism, the Treaty order has delegated responsibilities to the Crown. Matters that have not been delegated remain in the exclusive jurisdiction of the Indigenous legal and Constitutional order. In Canada, there are portions of Indigenous territory where no treaties exist and all jurisdictions, rights and responsibilities are retained by the Indigenous nation. Those inherent rights have not been subsumed or reconciled. Sec. 35 of the *Constitution Act, 1982*, merely reaffirms that prior Treaty reconciliation and delegation. Treaty federalism has created jurisdictional borderlines and did not replace either Indigenous or British legal systems.<sup>457</sup> Treaty federalism exists and is subject to Constitutional supremacy, not parliamentary or judicial supremacy, to justify unconstitutional infringements.

Constitutional inclusion recognizes that Aboriginal people have a different set of rights than other Canadians. Legal scholar, Patrick Macklem, in "Indigenous Difference in the Canadian Constitution," points out that the Constitutional relationship between Aboriginal people and the Canadian state promotes equal citizenship by acknowledging the Constitutional relevance of Indigenous difference. He notes that Aboriginal people are in a Constitutional relationship with Canada that does not exist with any other Canadian. He states that Constitutional law aspires to distributive justice and the Constitutional protection the equal distribution of Constitutional power. Macklem notes that the Constitutional power of Indigenous difference authorizes Aboriginal people to engage in the exercise of their rights, preserve their ancestral territories and entrench the promises made by the Crown in Treaty negotiations. It also gives rise to corresponding state obligations to establish the fiscal, social and institutional arrangements necessary to fulfill Treaty rights including Treaty processes.<sup>458</sup>

Consequently, consolidating treaty federalism into the Constitution of Canada is urgent and is an unfinished Constitutional reform. Treaty Constitutionalism has at least

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<sup>456</sup> *Ibid* at 274.

<sup>457</sup> *Ibid* at 301.

<sup>458</sup> Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2002) .

eight goals, (a) recognition of the legal personality of Treaty First Nations already acknowledged by prerogative treaties; (b) consolidating the existing treaties and determining the extent of each treaty's implementation or non-implementation; (c) immediate vesting of the specific power of self-determination of those recognized Treaty First Nations; (d) including the Treaty First Nations in the electoral apportionment of federal and provincial governments; (e) including Treaty First Nations in the national equalization formula; (f) limiting the powers of federal and provincial governments over Treaty First Nations to those that were formally delegated to the Crown in the treaties; (g) broad acknowledgment of the right of Aboriginal communities to enter into new treaties where there are no existing treaties; and (h) filling gaps in the old treaties in accordance with Human Rights Covenants.<sup>459</sup>

To be clear, Treaty Constitutionalism is not affirmative action based on race, it is based solely and exclusively on legal relationships and legal obligations from the sacred and inviolable Treaties. Treaty orders can unite with the current Canadian federalism to effect a reconciliation and does not have to undermine the foundation of Canada.<sup>460</sup> In fact, it is key to the elimination of colonialism and systemic racism that pervades the main stream Constitutional debate.<sup>461</sup> Treaty Constitutionalism would demand the informed consent of Treaty First Nations and accord with International standards.

Additionally, the solution of institutional reform for Treaty implementation was subject to comprehensive study by the *Royal Commission on Aboriginal People*. The final report, in addition to recommending a tri-partite federation, also recommended changes in the political institutions. Other recommendations suggest Parliament establish a Crown Treaty office, Treaty Commissions, and an Aboriginal Land and Treaties Tribunal. As well, the report suggested a new department of Aboriginal relations be created in each Province, with the Crown Treaty office leading the nation-to-nation Treaty process. The Treaty commissions would be permanent, independent, neutral

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<sup>459</sup> Henderson, "Treaty Federalism", *supra* note 24 at 327.

<sup>460</sup> *Ibid* at 325.

<sup>461</sup> *Ibid*.

bodies that would facilitate and oversee Treaty negotiations.<sup>462</sup> The Royal Commission also recommended Treaty legislation in Parliament that:

- (a) provides for the implementation of existing treaty rights, including the treaty rights to hunt, fish, trap;
- (b) "... affirms liberal rules of interpretation of historical treaties, having regard to
  - (i) the context of treaty negotiations,
  - (ii) the spirit and intent of each treaty, and
  - (iii) the special relationship between the treaty parties ...;
- (c) make oral and secondary evidence admissible in the court when they are making determinations with respect to historical treaty rights;
- (d) recognizes and affirm the land rights and jurisdiction of Aboriginal nations as essential components of treaty processes;
- (e) declares the commitment of Parliament and the Government of Canada to the implementation and renewal of each treaty in accordance with the spirit and intent of the treaty and the relationship embodied in it;
- (f) commits the Government of Canada to treaty processes that clarify, implement and where the parties agree, amend the terms of treaties to give effect to the spirit and intent of each treaty and the relationship embodied in it;
- (g) commits the Government of Canada to a process of treaty making with:
  - (i) Aboriginal nations that do not yet have a treaty with the Crown and
  - (ii) treaty nations whose treaties do not purport to address issues of lands and resources;
- (h) commits the Government of Canada to treaty processes based on, and guided by, the nation-to-nation structure of the new relationship, implying:
  - (i) that all parties demonstrating a spirit of openness, a clear political will, and a commitment to fair, balanced and equitable negotiations; and
- ...
- (i) authorizes the establishment, in consultation with treaty nations, of the institutions this Commission recommends as necessary to fulfill the treaty process.<sup>463</sup>

Constitutional and institutional reform is imperative to propelling Canada into a post-colonial era and adhering to the rule of law.

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<sup>462</sup> RCAP *Final Report* Vol. 2, *supra* note 445 Recommendations 2.2.13-13 to 16.

<sup>463</sup> *Ibid* at 68-69.

## 5.4 CONSTITUTIONAL CONFERENCES AS MODELS OF CONSULTATION

Treaty Constitutionalism through Constitutional reform is a structural reform that both Treaty First Nations and Canada have to address the manifestation of problems created by failed treaty implementation.<sup>464</sup> The problems that exist in the relationship between Indigenous nations and the Crown are often seen as legal problems when in fact they are political constructs. Currently, as in the past, the Canadian Government has neither developed a viable or successful process to implement the agreements they made in Treaty nor to properly consult when encroaching on the agreements. Federal statements, commissions, accords and roundtables on treaty implementation have been held without any real success in honouring the Crown's obligations. Examples of federal initiatives marred in bureaucratic barriers are the additions to reserve policy, specific and comprehensive claims processes, self government agreements and Treaty land entitlement issues that have proven to take decades to resolve.<sup>465</sup> As well, the court's framework on the honour of the Crown has further proven ineffective in protecting the Treaty order. The honour of the Crown and the duty to consult is implicit in the Treaty order as signed through mutual consent and nation-to-nation agreements.

At present, there is neither Federal nor Provincial policy on implementing Treaty. No constitutional consultation on implementation with Treaty Indigenous nations has been created. The lack of constitutional consultation on treaty implementation or potential alteration to the Treaty agreement is a constitutional failure of Federal and Provincial governments. Treaty orders and Treaty rights create a mandatory constitutional obligation on the Crown to address and resolve treaty implementation violations immediately. The court's jurisprudential framework for infringement of constitutionally protected Treaty rights violates the Treaty agreements and the absence of constitutional mechanisms of consultation creates a constitutional crisis and violates the rule of law, constitutional supremacy and the honour of the Crown.

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<sup>464</sup> <[http://www.afn.ca/uploads/files/usb/1\\_sca\\_national\\_strategy.pdf](http://www.afn.ca/uploads/files/usb/1_sca_national_strategy.pdf)[http://www.afn.ca/uploads/files/aga2013/11-12-23\\_draft\\_treaty\\_statement\\_en\\_print.pdf](http://www.afn.ca/uploads/files/aga2013/11-12-23_draft_treaty_statement_en_print.pdf)>

<sup>465</sup> Henderson, "Treaty Federalism", *supra* note 24 at 302.

Infringement of Treaty rights via the common law duty of consultation cannot occur in the manner envisioned by the courts. Treaties are constitutionally-protected agreements made between nations. Treaty rights are not undefined Aboriginal rights, they are existing, concrete rights that require negotiations to reconcile Treaty rights with the Canadian legal order. The proper forum for consultation on possible amendment of the sacred and inviolable Treaties is in the form of Constitutional conferences.

The provision for Constitutional conferences on Constitutional rights was provided in s. 37 *Constitution Act 1982*<sup>466</sup> wherein a minimum of two conferences, within five years, were to be held to discuss matters that affect Aboriginal people. The inclusion of both s. 35 and s. 37.1 of the *Constitution Act, 1982*, was only the beginning and the Constitutional agenda was considered yet unfinished. In the following years there had been three First Ministers' conferences: in 1984, 1985 and 1987. All focused primarily on defining a Constitutional basis for Aboriginal self government. The conferences ended without any resolutions.<sup>467</sup> As well, Treaty implementation was not discussed.<sup>468</sup>

Constitutional discussions on reform followed the patriation of the Constitution by a 1983 Report of the Special Committee of the House of Commons, known as the

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<sup>466</sup> *Constitution Act, 1982*, *supra* note 38, Part IV, Constitutional Conferences.

37.1 (1) In addition to the conference convened in March 1983, at least two constitutional conferences composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada, the first within three years after April 17, 1982 and the second within five years after that date.

(2) Each conference convened under subsection (1) shall have included in its agenda matters that directly affect the aboriginal peoples of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on those matters. (3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participating the discussions on any item on the agenda of a conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

(4) Nothing in this section shall be construed as to derogate from subsection 35(1).

<sup>467</sup> David C. Hawkes, *Aboriginal Peoples and Constitutional Reform: What Have We Learned?* (Kingston: Queen's University, 1989).; see also Norman Zlotkin, "The 1983 and 1984 Constitutional Conferences: Only the Beginning", [1984] 3 CNLR 3.

<sup>468</sup> See Henderson, "Treaty Federalism", *supra* note 24 at 302.

Penner Report.<sup>469</sup> The report recommended the establishment of a new relationship between the Crown and Indigenous nations, premised on Indian self government. It recommended that First Nations governments were to be established pursuant to a Federal Indian Regulations Act and then by Constitutional amendment. The report called for a tri-partite federation in Canada. A few years later, Canada signed statutory self government arrangements with the Cree and Naskapi in Quebec and Sechelt First Nation in B.C., and also introduced a community based self government policy, however none of these would have Constitutional status.<sup>470</sup> Issues in Quebec then dominated the Constitutional agenda with the Meech Lake accord signed shortly after the failed 1987 First Ministers conference on Aboriginal issues. In 1992, The Charlottetown Accord, now a Constitutional convention, had the promise to transform the relationship between the Crown and Indigenous people. The accord recognized Aboriginal governments as one of the three orders of governments. First Nation laws would replace Federal and Provincial laws subject to those "essential to the preservation of peace, order and good government in Canada." As well, the accord discussed a commitment to a joint process for Treaty implementation.<sup>471</sup> In October 1992, the Charlottetown Accord was rejected in a national referendum. Then in 2000, the Standing Senate Committee Report on "*Forging New Relationships; Aboriginal Governments in Canada*,"<sup>472</sup> recommended significant changes but in each case, the recommendations were not followed.<sup>473</sup>

In "Empowering Treaty Federalism," Henderson notes that after the inclusion of s. 35, Canada's prime ministers refused to implement Aboriginal and treaty rights and rejected the new Constitutional vision. Further, Treaty nations were denied standing to

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<sup>469</sup> Special Committee of the House of Commons on Indian Self Government, *Report of the Special Committee of the House of Commons on Indian Self Government*. (Ottawa: Queens Printer, 1983).

<sup>470</sup> Office of the Treaty Commissioner, *Treaty Implementation: Fulfilling the Covenant*, (Saskatoon: Office of the Treaty Commissioner, 2007) at 51.

<sup>471</sup> Final text of the Charlottetown Accord, August 28, 1992  
<[www.thecanadianencyclopedia.com/index.cfm?pgnm=TCE&Params=A1ARTA0010099](http://www.thecanadianencyclopedia.com/index.cfm?pgnm=TCE&Params=A1ARTA0010099)>.

<sup>472</sup> Standing Senate Committee on Aboriginal Peoples, "*Forging New Relationships: Aboriginal Governance in Canada*," <<http://www.parl.gc.ca/36/2/parlbus/commbus/senate/Com-c/ABOR-E/REP-E/rep03feb00-e/htm>>.

<sup>473</sup> Henderson, "Treaty Federalism", supra note 24 at 302.

speak in the Constitutional processes.<sup>474</sup> The Constitutional amendment conferences, the Meech Lake Accord and the Charlottetown Accord processes illustrated that the First Ministers of Canada ignored the fundamental context of the Constitutional rights of the Aboriginal peoples by assuming unilateral authority to select the delegates for the Aboriginal peoples, to fill any gaps in treaty federalism and to determine Aboriginal peoples' destiny.<sup>475</sup> This selection process denied Aboriginal and treaty rights by refusing to seat the 30 distinct nations that signed treaty and instead chose federal funded lobby groups.<sup>476</sup> Canada's selection of Aboriginal delegates was on the basis groupings according to Canadian law rather than on Constitutional rights. Thus, these Constitutional discussions avoided fulfilling treaty federalism, implementing self-determination and implementing treaty rights for self-government. Treaty First Nations have always argued that any change in their legal relationships with the imperial Crown requires their consent and further, any external change would be a violation of their Aboriginal rights, treaty rights and, now, their human rights.<sup>477</sup> These issues sidetracked the Constitutional amendment processes and failed to expose treaty federalism underlying the Constitutional provisions or to elaborate the practical meaning of these Constitutional rights in Canadian federalism.<sup>478</sup> Professor Henderson notes that due to the flawed structure, the conferences failed to expose treaty federalism underlying the Constitutional provisions or to elaborate the practical meaning of these Constitutional rights in Canadian federalism.<sup>479</sup>

In 2005 the *First Nations-Federal Crown Political Accord on the Recognition and Implementation of First Nations Governments*<sup>480</sup>, was developed to make federal policy consistent with the decisions of the Supreme Court. One of the primary purposes of the accord was "to commit parties to work jointly to promote meaningful process for

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<sup>474</sup> *Ibid* at 302.

<sup>475</sup> *Ibid.*

<sup>476</sup> *Ibid* at 303, the First Ministers endorsed four federally funded lobby groups.

<sup>477</sup> *Ibid* at 303.

<sup>478</sup> *Ibid.*

<sup>479</sup> *Ibid* at 303.

<sup>480</sup> Minister of Northern Development, *First Nations - Federal Crown Political Accord on the Recognition and Implementation of First Nations Government* (Ottawa: Indian and Northern Affairs Canada, 2005), online: Assembly of First Nations <<http://afn.ca/cmslib/general/PolAss.pdf>>.

reconciliation and implementation of s. 35 rights with First Nation governments to achieve an improved quality of life ..."<sup>481</sup> The reference to treaty within a governance orientated political accord is a commitment by the government to develop policy toward treaty implementation in Indigenous governance.<sup>482</sup>

Consultation through Constitutional dialogue between Indigenous and Canadian governments is proper and just consultation. The conferences will address the treaty agreements between the Treaty Nations and the Crown with each selecting their delegates. The conferences are not based upon the Indian Act model. Its first task is to create a consensual consultation arrangement over the Treaty areas. Treaties are consensual and binding agreements that not only import legal and Constitutional duties, but moral obligations on all citizens in Canada. Constitutional reform, treaty federalism and Constitutional conferences as models of consultation will fulfill the promise made in Treaty and has the promise of transforming the relationship between the Crown and First Nation people. It was also bring about the reconciliation demanded by the affirmation of Treaty rights in s. 35(1) and s. 52(1) of the *Constitution Act, 1982*.

## 5.5 CONCLUSION

Some will say that the argument set forth in this thesis is the ‘Indian argument’ which asserts that the accurate interpretation of Canada's Constitution ought to have begun with a proper recognition of Indigenous Constitutional orders by placing them within the shared rule as mandated by the sacred and inviolable Treaties. In actuality, the argument set forth in this thesis is about the rule of law, Constitutional supremacy and for Canada to follow the law and implement the Treaty agreements they signed with the Indigenous Nations. The solution of a shared Constitution is not based on racial or ethnic standards but on the legal documents that created Canada.

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<sup>481</sup> *Ibid.*

<sup>482</sup> Henderson, “Treaty Federalism”, *supra* note 24 at 303.



The inclusion of Aboriginal and treaty rights in the Canadian Constitution in 1982 ushered in great possibilities for Indigenous peoples, treaty and Aboriginal governments and their Constitutional orders. Its potential is tremendous. It provides and opportunity for decolonizing Canada and as pointed out by Henderson, Benson and Findlay, “The spirit and the intent of section 35(1), then, should be interpreted as “recognizing and affirming” Aboriginal legal orders, laws and jurisdictions unfolded through Aboriginal and treaty rights. ...” What this means is that the Sec. 35 rights are in actuality a recognition and affirmation of Indigenous legal and Constitutional orders. This is the promise of the Sec. 35. The potential for decolonization is tremendous as the Constitution not only protects Indigenous Constitutional orders but it provide recognition through Aboriginal and treaty rights into, and reconciliation with, the Canadian Constitutional order.<sup>483</sup> Treaties did not limit Indigenous legal or Constitutional orders but rather supplemented the peaceful coexistence in the relationship. Neither the assertion of Crown sovereignty nor the entrenchment of Sec. 35, *Constitution Act 1982*, replaced or extinguished their existence. The jurisprudence and Crown policy have not recognized the existence and continuation of Indigenous legal orders and rights. Indigenous legal and Constitutional orders include all inherent rights, original title, jurisdiction and sovereignty and are entitled to the protection of Canada's Constitution and the rule of law. The courts cannot complete this task. It is the Canadian government that has the onus for this political undertaking. The lack of political interest has plagued our country and affected the ability of Indigenous people to assume their rightful place in society. Lack of political will and accountability to Indigenous people is the reason for a lack of change for First Nations.

There is nothing precluding the Government of Canada from jointly agreeing to the scope and content of Indigenous legal and Constitutional orders entrenched in s. 35. The *Royal Commission on Aboriginal People* has stated, “an agreed treaty process can be

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<sup>483</sup> Henderson, *Aboriginal Tenure*, *supra* note 446 at 432-433.

the mechanism for implementing virtually all the recommendations in our report, indeed, it may be the only legitimate way to do so.”<sup>484</sup>

The fear that recognizing Treaty Constitutionalism would lead to independence, separation and endangering the country is irrational. For it was Treaty that reconciled foreign sovereign nations together in commitments of mutual co-existence. It is Treaty that inextricably links the Crown and Indigenous nations together on a path of sharing, mutual respect and mutual accommodation. In restoring Treaty Constitutionalism, Canada’s parliament is being asked to do what was originally agreed upon in Treaty. They are being asked to fully comply with the treaty sovereigns sacred undertakings to one another, *Kihci-asotamâtowin*, of shared rule over a shared territory. They are simply being asked to fulfil their part of the bargains as Treaty Indigenous people have kept theirs.

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<sup>484</sup> The Royal Commission on Aboriginal People, *People to People, Nation to Nation: Highlights from the Report of the Royal Commission on Aboriginal Peoples* (Ottawa: The Commission, 1996) at 51.

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